

PRELIMINARY STATEMENT

The defendant respectfully requests that the court grant the motion to dismiss for lack of subject matter jurisdiction. The defendant's argument is that the plaintiff's claim is barred by the *Feres* doctrine and should thus be dismissed pursuant to FRCP 12(b)(1).

STATEMENT OF FACTS

The United States Army runs a weekend hunting program open to civilians and servicemembers at Fort Hunter Liggett (FHL), a U.S. Army live artillery fort. To participate in the hunting program, civilians are required to have a California hunting license and a FHL hunting permit. To obtain such a permit civilians must fill out an application affirming that they have read the FHL hunting regulations and pay a fee. Civilians must also check in with a servicemember at the Fishing and Hunting Center to show their license and permit, obtain a tag for their car, and inform the servicemember of what hunting area (HA) they will be hunting in.

Civilian hunters checking in at the Fishing and Hunting Center receive a copy of the base hunting regulations and a map of the base that must be approved by military leadership in Washington D.C. On the day of the incident in question the map provided to hunters did not label HA 11 as "archery-only," because, although that change had been made by the military the year prior, the updated map had not yet been approved by military leadership. The rules provided on the day of incident did not list HA 11 as "archery-only," but there was a sign posted in the Hunting and Fishing Center to that effect.

Servicemembers hunting at FHL have a different check-in procedure. They receive a designated servicemember permit, and servicemembers under a certain rank (E-6) are not required to pay a fee. Servicemembers can get their permit on base at Camp Roberts, which adjoins FHL, and they do not have to go to the Fishing and Hunting Center to get it.

Servicemember hunters do receive a copy of the rules and a map, but they are permitted to travel on military personnel only roads at FHL that are not on the map that civilian hunters receive. Servicemembers are also permitted to enter restricted HAs and travel between HAs while hunting. Finally, servicemembers are not permitted to drink alcohol while at FHL, but civilians may.

On the day of the incident in question Private First Class (PFC) Justin Levin was hunting in HA 11 at FHL. PFC Levin had travelled from Camp Roberts to FHL on military personnel-only roads and through multiple HAs while on a weekend pass to go hunting. The hunter who fired the shot that hit PFC Levin was not aware that HA 11 was archery-only.

The parties have completed the pleadings stage and conducted depositions prior to conclusion of the discovery stage.

ARGUMENT

THIS COURT MUST DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE PLAINTIFF’S CLAIMS ARE BARRED BY THE *FERES* DOCTRINE.

A motion to dismiss related to the *Feres* doctrine is a “FRCP 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.” *Dreier v. United States*, 95 F.3d 1435, 1439 (9th Cir. 1996).

The doctrine of sovereign immunity generally prevents the United States government from being sued without permission. However, “[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances” 28 U.S.C.A. § 2674 (West). But under the *Feres* doctrine, the government is not liable for injuries to military servicemembers where “the injuries arise out of or are in the course of activity incident to service.” *Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007) (internal quotations omitted). *Feres* and *Johnson* require the

protection of the military disciplinary structure from harm resulting from civil action. *See Bon v. United States*, 802 F.2d 1092, 1096 (9th Cir. 1986).

In the Ninth Circuit, four factors are used to evaluate cases under the *Feres* doctrine, “(1) the place where the negligent act occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of the plaintiff’s status as a service member, and (4) the nature of the plaintiff’s activities at the time the negligent act occurred.” *McConnell v. United States*, 478 F.3d 1092, 1095 (9th Cir. 2007). In applying these factors, “comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases.” *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001) (internal quotations omitted).

A. Factor one weighs in favor of a *Feres* bar because the incident occurred on military property.

The first *Johnson* factor to consider is “the place where the negligent act occurred” *McConnell*, 478 F.3d at 1095. Where the negligent act took place is not dispositive, but it is “undoubtedly an important indicator of the status of the injured service member.” *Johnson v. United States*, 704 F.2d 1431, 1436 (9th Cir. 1983).

Here, the incident occurred at FHL, an active military training facility adjacent to Camp Roberts. PFC Levin was at FHL for recreational hunting under a special permit. Although civilians were also allowed to hunt at FHL with a permit, PFC Levin accessed FHL using roads that were limited to military use only and continued to use such roads while traveling within FHL. Furthermore, PFC Levin parked in his car in Hunting Area (HA) 12A, an area off-limits to civilians but accessible to service members with the appropriate sticker on their car. PFC Levin then crossed into HA 11, where the incident occurred, from HA 12A. Both actions arose from

PFC Levin's life on military property, and the entirety of the incident took place on military property.

B. Factor two weighs in favor of a *Feres* bar because the decedent was an active-duty service member at the time of the incident.

The second *Johnson* factor is “the duty status of the plaintiff when the negligent act occurred” *McConnell*, 478 F.3d at 1095. “The duty status of the plaintiff, while no dispositive, is often taken into account when deciding whether an activity is truly incident to service.” *Johnson*, 704 F.2d at 1437. “The important question is whether the service member on active-duty status was engaging in an activity that is related in some relevant way to his military duties.” *Id.* at 1438. Importantly, “military-sponsored activities fall within the *Feres* doctrine, regardless of whether they are related to military duties” and this includes “military-sponsored recreational programs.” *Costo*, 248 F.3d at 868-69.

PFC Levin was an active-duty soldier stationed at Camp Roberts at the time of the incident. Although he was on a weekend pass while hunting at FHL, PFC Levin remained an active-duty service member. As noted above, PFC Levin was at FHL for recreational hunting, which in and of itself is not directly related to his military duties. However, the hunting program at FHL, including the permit and check-in processes and the Fishing and Hunting Center, is operated by entirely by the military. Lieutenant Colonel Easley oversees the operation of FHL, a servicemember operates Fishing and Hunting Center, and the maps and rules are published by the military, making hunting at FHL a military-sponsored activity. As such, PFC Levin's hunting activities at FHL were a part of a “military sponsored recreational program” and thus satisfy the second *Johnson* factor and weigh heavily in favor of barring the plaintiff's claim under the *Feres* doctrine.

C. Factor three weighs in favor of a *Feres* bar because the decedent was accruing benefits because of his military status at the time of the incident.

The third *Johnson* factor is “the benefits accruing to the plaintiff because of the plaintiff’s status as a service member” *McConnell*, 478 F.3d at 1095. The *Feres* doctrine bars suits by service members injured while participating in “on-base or government-sponsored recreational activities.” *Johnson*, 704 F.2d at 1438. Where “plaintiffs had access to the various recreational benefits only because of their status as military personnel . . . the injuries suffered were incident to service because the plaintiffs would not have been privileged to take advantage of the benefits but for their military status.” *Id.* at 1438-39.

When the plaintiff’s use of military facilities for recreational activities arises from a status not like that of any civilian also partaking in the activities, the plaintiff accrues benefits because of his status as a service member. *See Bon* 802 F.2d at 1094-95. For example, in *Bon*, the plaintiff was able to rent a canoe through the Special Services Center solely because of her status as a service member as civilians could only access the Center as guests or dependents of service members. *Id.* at 1095. The court reasoned that *Bon* “did not occupy a status similar to that of any civilian in her presence” while using the Center and its equipment. *Id.*

On the other hand, when a service member is “indistinguishable” from a civilian, he is not receiving benefits of his service. *See Dreier* 95 F.3d at 1444-45. For instance, in *Dreier* the decedent died while engaging in leisure activities on a military property that typically required civilians to obtain a permit to be present, but civilians could access the area in question without getting a permit or going through any military checkpoints. *Id.* The court reasoned that because of these facts a servicemember engaging in leisure activities in an area open to the public is “in the same position as any civilian would have been at the time of the government's negligence.” *Id.* at 1445.

Here, PFC Levin was partaking in weekend hunting on FHL alongside civilians who had permits to use the military installation for the same purpose. However, PFC Levin's use of FHL and participation in hunting activities were different from that of the civilians present. First, PFC Levin did not have to pay for his hunting permit because of his military status and rank, whereas civilians had to pay a fee to obtain a permit, which is evidence that he accrued and benefit and occupied a status different than that of civilians. That difference in status is supported by the fact that service members have a special permit designating their military status. Furthermore, higher ranking service members did have to pay for a permit, which gives more support to the fact that PFC Levin was accruing a benefit of his military service while hunting at FHL. Finally, PFC Levin and other service members were subject to a different rule regarding alcohol consumption because the military prohibited service members from drinking while hunting, but no such restrictions existed for civilians, proving once again that service members occupied a different status than civilians while using FHL.

Like the lack of a "status similar to that of any civilian" in the *Bon* case, PFC Levin and other service members hunting at FHL were allowed to move between HAs while hunting, a use of the military facilities only accessible because of his military status. Furthermore, PFC Levin was allowed to enter restricted HAs and travel on military use only roads while at FHL, a use arising solely from his military status. Finally, service members hunting at FHL do not have to check in at the Fishing and Hunting Center, they can complete the permit and check-in process at Camp Roberts without notifying anyone of their hunting location, a privilege only available to service members. PFC Levin's movements on FHL were entirely different from those of civilian hunters, and he thus occupied a different status and accrued benefits due to his military service.

Unlike in *Dreier*, where the servicemember was “in the same position as any civilian would have been at the time of the government's negligence,” PFC Levin was subject to rules that civilian hunters were not. He, and any other servicemember hunting at FHL, could not consume alcohol while hunting, making him distinguishable from a civilian while hunting. Also, unlike in *Dreier*, the facts indicate that civilians did not enter FHL or any of the restricted HAs or military use only roads without the required permits. These facts distinguish PFC Levin from civilians also present at FHL and make it clear that he was accruing benefits of his military service while hunting on the day of the incident.

D. Factor four weighs in favor of a *Feres* bar because the nature of the decedent’s activities at the time of the incident were incident to his military service.

The fourth *Johnson* factor is “the nature of the plaintiff’s activities at the time the negligent act occurred.” *McConnell*, 478 F.3d at 1095. For this factor it is important to distinguish whether the service member’s activities at the time of the alleged negligence were of the sort that “could harm the disciplinary system if litigated in civil action.” *Johnson*, 704 F.2d at 1439. This is because military decision-makers subject to civil suit “might not be willing to act as quickly and forcefully as is necessary . . .” if their actions can be second-guessed by a civil court, and it could encourage servicemembers to “question decisions by their superiors” and have “some effect on the willingness of such personnel to follow orders.” *Id.*

When allowing the suit to proceed would require the discovery and evaluation of military command structure, instructions, and programs by a civilian court, the plaintiff’s activities at the time the negligent act occurred are military in nature. *See McConnell*, 478 F.3d at 1097-98. For example, in *McConnell*, the plaintiff’s activities were purely recreational but sponsored by the military and involved military maintenance and instruction. *Id.* The court reasoned that because the adequacy of the military’s maintenance practices, boat use instructions, and recreational

programming would need to be evaluated to resolve the case, the claim could not proceed to protect the “military discipline” structure. *Id.* at 1098.

Here, the hunting activities at FHL that led to PFC Levin’s death were of the sort that could harm the disciplinary system if litigated in civil court. The rules that PFC Levin was subject to while hunting at FHL implicate the military discipline system. Military rules barred PFC Levin from consuming alcohol while hunting, he was required to obtain a weekend pass because he would not have cell-service while on leave, and the hunting permit and rules were proscribed by the military. As such, the entirety of PFC Levin’s actions at FHL were subject to the military discipline structure, which bars this claim from continuing under the *Feres* doctrine.

Furthermore, the key negligent act at issue in the plaintiff’s claim is that the military failed to provide hunters with up-to-date hunting maps, rules, and adequate signage that identified HA 11 as archery-only. These materials were not current at the time of the incident because they had to be approved by the military chain of command in Washington, thus implicating the military discipline structure. This is like *McConnell* because litigating this case would require a civil court to examine and judge of military oversight practices, civilian hunting instructions, and service member recreation programs, which were all reasons the court dismissed the plaintiff’s claim. Even though PFC Levin’s activities were entirely recreational at the time of the incident, allowing the suit to proceed would require the discovery and evaluation of military command structure, instructions, and programs by a civilian court, making the plaintiff’s activities at the time the negligent act occurred military in nature.

CONCLUSION

The plaintiff’s claims and evidence are barred by the *Johnson* criteria used to evaluate whether service members can bring negligence cases against the United States under the *Feres*

doctrine and should be dismissed for lack of subject matter jurisdiction pursuant to FRCP

12(b)(1).

Applicant Details

First Name **Keith**
 Last Name **Penney**
 Citizenship Status **U. S. Citizen**
 Email Address kap248@cornell.edu
 Address

Address
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6 Sunset Hill Road
City
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State/Territory
Connecticut
Zip
06070
Country
United States

Contact Phone Number **8605976772**

Applicant Education

BA/BS From **Williams College**
 Date of BA/BS **May 2021**
 JD/LLB From **Cornell Law School**
<http://www.lawschool.cornell.edu>
 Date of JD/LLB **May 11, 2024**
 Class Rank **20%**
 Law Review/Journal **Yes**
 Journal(s) **Cornell Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Cuccia Moot Court**
Rossi Moot Court
Langfan Moot Court

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships **No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Weyble, Keir
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Rachlinski, Jeffrey
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607-255-5878

Dorf, Michael
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(607) 255-3890

This applicant has certified that all data entered in this profile and any application documents are true and correct.

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860-597-6772

06/09/2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to apply for a clerkship in your chambers for the 2024-25 term. I am a rising third-year law student at Cornell Law School where I am an Articles Editor of the *Cornell Law Review*. In addition to my focus on legal academics, I was also president of the Cornell chapter of the American Constitution Society, organizing panel events, holding constitutional law review sessions for students, and hosting dinners with federal judges.

Enclosed are my resume, transcript, law school grading policy, and writing sample. Letters of recommendation from Cornell Law School professors Dorf, Rachlinski, and Weyble will follow. Please let me know if you require any additional information. Thank you for your consideration.

Sincerely,



Keith Penney

Enclosures: resume, transcript, law school grading policy, and writing sample.

Keith A. Penney6 Sunset Hill Road, Simsbury, CT 06070 | kap248@cornell.edu | 860-597-6772**EDUCATION**

Cornell Law School	Ithaca, NY
<i>Candidate for Juris Doctor</i>	May 2024

GPA: 3.71Honors: Fredric H. Weisberg Prize for Constitutional Law;
Myron Taylor Scholar (top 30% at end of 2L year); Dean's List (three semesters)Activities: *Cornell Law Review*, Articles Editor; American Constitution Society, President;
Constitutional Law Teaching Assistant; Research Assistant to Professor Michael Dorf;
Langfan, Cuccia, and Rossi Moot Court; Moot Court General Board

Williams College	Williamstown, MA
<i>Bachelor of Arts in Political Science</i>	May 2021

GPA: 3.69Honors: Dean's List (six semesters)Activities: P3 Prison Tutoring**EXPERIENCE**

Milbank LLP	New York, NY
<i>Summer Associate</i>	May 2023–July 2023

- Researched litigation strategy on statute of limitations for 12(b)(6) memo of a firm client.
- Prepared synopsis of SEC complaint to understand the direction of agency enforcement in novel area.

Capital Punishment Clinic, Cornell Law School	Ithaca, NY
<i>Student Attorney</i>	August 2022–December 2022

- Prepared section of parole memo for client incarcerated for over thirty years in South Carolina.
- Researched changes in South Carolina's capital punishment statute relevant to our client.

Cornell Defender Program	Bath, NY
<i>Legal Intern</i>	May 2022–August 2022

- Argued in front of judges during arraignment bail hearings.
- Researched novel issues related to New York "Raise The Age" legislation.
- Aided in the representation of a client during a felony robbery and burglary trial.

Mary Glassman for Congress	Simsbury, CT
<i>Field Organizer</i>	May 2018–August 2018

- Organized phonebank and canvas operations for a team of two dozen volunteers.
- Recruited campaign volunteers from forty-one towns across the district.

Connecticut Division of Public Defender Services	New Haven, CT
<i>Legal Intern</i>	September 2016–August 2017

- Reviewed jail phone call evidence with murder defendant as part of pre-trial preparation under attorney Michael Courtney.
- Conducted legal research on the admissibility of expert witnesses in Connecticut trials.

INTERESTS

Watching European soccer, following American politics.

Cornell Law School - Grade Report - 06/09/2023

Keith A Penney

JD, Class of 2024

Course	Title	Instructor(s)	Credits	Grade			
Fall 2021 (8/24/2021 - 12/3/2021)							
LAW 5001.1	Civil Procedure	Clermont	3.0	A-	CALI		
LAW 5021.1	Constitutional Law	Dorf	4.0	A+			
LAW 5041.2	Contracts	Kadens	4.0	B+			
LAW 5081.5	Lawyering	Freed	2.0	B+			
LAW 5151.2	Torts	Hans	3.0	A+			
	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.8312
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.8312

^ Dean's List

Spring 2022 (1/18/2022 - 5/2/2022)

LAW 5001.2	Civil Procedure	Gardner	3.0	B+			
LAW 5061.1	Criminal Law	Arnaud	3.0	A-			
LAW 5081.5	Lawyering	Freed	2.0	B+			
LAW 5121.1	Property	Dinner	4.0	A-			
LAW 6011.1	Administrative Law	Rachlinski	3.0	A			
	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	15.0	15.0	3.6226
Cumulative	31.0	31.0	31.0	31.0	31.0	31.0	3.7303

^ Dean's List

Fall 2022 (8/22/2022 - 12/16/2022)

LAW 6131.1	Business Organizations	Hockett	3.0	B+			
LAW 6263.1	Criminal Procedure - Adjudication	Blume	3.0	A-			
LAW 6861.620	Supervised Teaching	Johnson	2.0	SX			
LAW 7811.301	Capital Punishment Clinic 1	Johnson/K. Weyble	4.0	A-			
	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	12.0	12.0	12.0	12.0	10.0	10.0	3.5680
Cumulative	43.0	43.0	43.0	43.0	41.0	41.0	3.6907

Spring 2023 (1/23/2023 - 5/16/2023)

LAW 6401.1	Evidence	K. Weyble	4.0	A-			
LAW 6431.1	Federal Courts	Gardner	4.0	A			
LAW 6436.1	Practicing Criminal Defense in Federal Court	Zelin	2.0	SX			
LAW 6437.1	Federal Practice and Procedure	Nathan	1.0	SX			
LAW 6641.1	Professional Responsibility	Atiq	3.0	A-			
	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	11.0	11.0	3.7900
Cumulative	57.0	57.0	57.0	57.0	52.0	52.0	3.7117

^ Dean's List

Total Hours Earned: 57



Cornell Law School

Lawyers in the Best Sense

June 2023

Cornell Law School Grading Policy for JD Students

Faculty grading policy calls upon each faculty member to grade a course, including problem courses and seminars, so that the mean grade for JD students in the course approximates 3.35 (the acceptable range between 3.2 and 3.5). This policy is subject only to very limited exceptions.

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

Class Rank

As a matter of faculty policy, we do not release the academic rankings of our students. Interested individuals, including employers, have access to the top 10% approximate cumulative grade point cut off or the most recent semester of completion. In addition, at the completion of the students second semester and every semester thereafter the top 5% approximate cumulative grade point average is also available. In general students are not ranked however the top ten students in each class are ranked and are notified of their rank.

Class of 2023 [six semesters]:

5% - 3.9204; 10% - 3.8364

Class of 2024 [four semesters]:

5% - 3.9048; 10% - 3.7897

Class of 2025 [two semesters]:

5% - 3.9475; 10% - 3.8350

Dean's List

Each semester all students whose **semester** grade point average places them in the top 30% of their class are awarded Dean's List status. Students are notified of this honor by a letter from the Dean and a notation on their official and unofficial transcripts.

Myron Taylor Scholar

This honor recognizes students whose cumulative MPR places them in the top 30 percent of their class at the completion of their second year of law school. Students are notified of this honor by a letter from the Dean of Students.

Academic Honors at Graduation

The faculty awards academic honors at graduation as follows: The faculty awards the J.D. degree summa cum laude by special vote in cases of exceptional performance. The school awards the J.D. degree magna cum laude to students who rank in the top 10% of the graduating class. Students who rank in the top 30% of the class receive the J.D. degree cum laude unless they are receiving another honors degree. For the graduating Class of 2023, the GPA cut off for magna cum laude was 3.8364 and for cum laude was 3.6627. Recipients are notified by a letter from the Dean and a notation on their official and unofficial transcripts.

The Order of the Coif is granted to those who rank in the top 10% of the graduating class. To be eligible for consideration for the Order of the Coif, a graduate must be in the top 10% with 75% of credits taken for a letter grade.

Prior to fall 2018, faculty who announced to their classes that they might exceed the cap were free to do so. If the 3.5 cap was exceeded in any class pursuant to such announcement, the transcript of every student in the class will carry an asterisk (*) next to the grade for that class, and for various internal purposes such as the awarding of academic honors at graduation, the numerical impact of such grades will be adjusted to be the same as it would have been if the course had been graded to achieve a 3.35 mean.

For detailed information about exceptions and other information such as grading policy for exchange students please go to the Exam Information & Grading Policies link at <http://www.lawschool.cornell.edu/registrar>.





Cornell Law School

KEIR M. WEYBLE
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June 11, 2023

The Honorable Jamar K. Walker
 United States District Court
 for the Eastern District of Virginia
 Walter E. Hoffman United States Courthouse
 600 Granby Street
 Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to recommend Keith Penney for a judicial clerkship. I have known him since the start of the Fall 2022 law school semester, first as a student in the Capital Punishment Clinic that I co-teach, and more recently in my Evidence course.

Keith was a strong student in both the classroom and clinical settings. The Evidence class was relatively large, which limited the amount of interaction I could have with any individual student, but Keith made his presence known as a consistent contributor to classroom discussions. His comments were reliably insightful and well-considered, and reflected good preparation and thoughtful engagement with the course material. His final exam performance was also strong enough to place him in the top one-third of the class with a final grade of A-.

I spent more time with Keith, and had a fuller opportunity to observe and evaluate him, in the clinical setting. He was part of a four-student team assigned to investigate and identify claims for relief to be brought on behalf of a client whose conviction was relatively old, but against whom the evidence appeared especially (and troublingly) thin. The work ranged from records collection and review, to legal research and memo preparation, to several days of field investigation in the southern state where the client was convicted and sentenced. Keith approached every task – big and small, interesting and not-so-interesting – with enthusiasm. His work reviewing and cross-checking the case records demonstrated a keen eye for detail and connections, and led to several promising and previously unknown leads. His legal research and writing was sharp, focused, and cogent. And his work during the investigative trip was energetic, insightful, and productive. Across all of these tasks, and across the length of the semester, Keith also proved to be a quick and reliable worker who required no extra direction, and a natural, generous collaborator who was well-liked and respected by the other members of his team. In short, he performed very well on every task assigned and in every setting encountered during his time in the clinic.

In addition to the other strengths outlined above, I can also say without hesitation that Keith is a personable and likeable young man with a friendly, engaging personality and a good sense of humor. In combination with his intellectual gifts, his strong work ethic, and the ease with which he



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gets on with others, I would expect him to be very successful as a judicial law clerk. I therefore recommend him highly and without reservation.

Please do not hesitate to contact me if I can provide you with additional information.

Sincerely yours,

A handwritten signature in dark ink, appearing to read 'Keir M. Weyble', with a stylized, flowing script.

Keir M. Weyble
Clinical Professor of Law





Cornell Law School

JEFFREY J. RACHLINSKI
Henry Allen Mark Professor of Law

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June 11, 2023

The Honorable Jamar K. Walker
United States District Court
For the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write to you in support of Mr. Keith Penney's application for a judicial clerkship with you. Mr. Penney was enrolled in my Administrative Law course at Cornell Law School in the Fall of 2022 and in a Civil Procedure class I co-taught in his first year. I have had several discussions with Mr. Penney and called on him many times in class. Consequently, I came to know him fairly well.

Mr. Penney performed well in class. He was consistently prepared and demonstrated the ability to digest complex materials. He is also very good at thinking on his feet. Furthermore, he asked several interesting follow-up questions after class. It is clear that as Mr. Penney learned more, he became more engaged in the course. Several discussions with him also suggested to me that he is someone who likes to be challenged and gets more excited as the going gets tougher. He is also clearly a hard-working student who does not let himself get behind in his responsibilities.

I have also read Mr. Penney's student note. He discusses the different ways the Supreme Court has approached the concept of intent in constitutional law, from *Washington v. Davis* to *Trump v. Hawaii*. These cases concern how the Court is supposed to treat evidence (or lack thereof in some cases) that a governmental actor harbored an unconstitutional motive in enacting what would otherwise be a constitutionally permissive statute. He makes a plea for consistency and balance. The note shows a good eye for topics. He is clearly right that the Supreme Court adopts completely different approaches. For my taste, the note would have to address why consistency is needed in different contexts, but the piece hits the mark and is well worth reading. It is also very nicely written. In particular, it provides excellent, succinct summaries of the cases he discusses. The ability he demonstrates in this paper to summarize law and find gaps and inconsistencies will be a terrific asset in your chambers.



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It is also worth noting that Mr. Penney has been an energetic and valuable member of our community. He has almost single-handedly revitalized the Cornell chapter of the American Constitution Society. Our students tend not to be politically oriented, at least for law students. They are focused on their careers, which largely take them to large law firms. I like their focus, but a well-rounded lawyer is also an engaged citizen who cares about politics and government. To my eyes, a robust law-school community needs the ACS and the Federalist Society on campus to engage in active, civil, constructive debate. The pandemic flattened out all of that, and we are grateful for students like Mr. Penney who are revitalizing this important aspect of our community. I am sure he will bring all of that constructive energy with him to your chambers.

In short, I recommend Mr. Penney to you as a clerk. In addition to his skills as a lawyer, he is a truly responsible, mature, and warm person. I have little doubt that you would enjoy working with him. If you have any questions about him, please feel free to contact me.

Very Truly Yours,



Jeffrey J. Rachlinski
Henry Allen Mark Professor of Law



Cornell Law School

MICHAEL C. DORF
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June 10, 2023

The Honorable Jamar K. Walker
 United States District Court
 for the Eastern District of Virginia
 Walter E. Hoffman United States Courthouse
 600 Granby Street
 Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to give my strongest possible recommendation for Keith Penney, who has applied for a position as a law clerk in your chambers following his graduation from Cornell Law School in May 2024. Keith brings a rare combination of first-rate intellectual firepower and an extraordinary work ethic.

Keith stood out as the top student in my constitutional law class in the fall of 2021. In class, his comments and questions showed a penetrating mind and, most impressive, an ability to understand the material in a wider historical and political context without losing sight of the relevant doctrinal framework. I often tell my students that legal realism is useful in advising clients and plotting litigation strategy but cannot be directly incorporated into advocacy. Keith grasped that insight without my need to explain it. He has an experienced lawyer's knack for making creative arguments that still color within the lines of the legal texts and precedents. I am sometimes surprised when I learn the identity of the student who wrote the top anonymously graded exam. I was not surprised in Keith's case. He was the best student in class discussion, and he wrote the top exam.

Based on Keith's outstanding performance in my class, I asked him to work for me both as a research assistant and a teaching assistant (TA). In the former role, he provided excellent material to help me in updating my constitutional law casebook for its next edition. In the latter role, Keith stood out. I have been blessed over the years with many terrific TAs. Most have gone on to have outstanding careers as lawyers. About a dozen are law professors. A few are judges. None did a better job as a TA than Keith did. Although attendance at his weekly review sessions was optional, the room was invariably packed. In their evaluations, the 1Ls in the class for which Keith TA'd uniformly praised the clarity of his presentations, his patience and thoroughness in answering their questions, and his availability at all hours to assist them. Frankly, I was a bit jealous of how they received his teaching relative to mine!

Keith's splendid performance as my TA was all the more remarkable in light of his very heavy workload. The Capital Punishment Clinic is practically a full-time job. Keith also was very active as an associate for the Cornell Law Review and in the Cornell Chapter of the American Constitution Society (ACS, for which I serve as faculty adviser). Given his excellent work in those organizations, he was chosen as an Articles Editor of the law review and as President of the ACS chapter. Meanwhile, Keith shone as a participant in each of the moot court competitions he entered; to fill the few remaining waking hours in his schedule, he now serves on the moot court board, another labor-intensive activity.



Clerkship recommendation for Keith Penney – Page 2

Despite his outstanding analytic ability, clarity of thought and expression, and doggedness, Keith is personally unassuming and modest. Calm and unflappable, he would be an excellent fit in just about any judicial chambers. I recommend him enthusiastically and without reservation.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael C. Dorf". The signature is fluid and cursive, with a large, stylized "M" and "C".

Michael C. Dorf
Robert S. Stevens Professor of Law



Writing Sample Cover Page

What follows is an unpublished draft of my Note unedited by anyone else. The topic is a comparison between the use of intent inquiries in different areas of constitutional law. The argument sections begin on page twelve of the document. I appreciate your consideration of my application.

Sincerely,
Keith Penney

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I. INTRODUCTION

The concept of “purging the taint” of impermissible animus has been gaining relevance among commentators on constitutional law.¹ The idea is fairly basic: what must be done for a state actor who had previously given indications of acting for an impermissible reason – either out of animus towards a disfavored group or out of pretext to conceal their otherwise bad intentions – to have sufficiently laundered away that impermissible intent so as to allow the action to be undertaken?² It’s a simple concept with great importance for constitutional law. Cases involving ideas as vast as broad-scale immigration restriction turn on this question.³

This Note seeks to contribute to the existing scholarship on the topic by examining in detail how three cases in particular handle the intent inquiry, then recommending a specific approach to the resolution of the problem of purging the taint in explicit-intent animus cases. The first of these cases, *Trump v Hawaii*, relates to former President Trump’s multiply-attempted “travel ban” of predominantly Muslim immigrants entering the United States.⁴ The second, *Washington v. Davis*, is a landmark case in the Equal Protection context for its introduction of an intent inquiry into nearly all cases of disparate impact despite a facially neutral government action.⁵ And the third, *West Lynn Creamery v. Healy*, is a case applying the Dormant Commerce Clause that shows how evidence of explicit intent can be used in cases that leave open questions on the borders of lines of constitutional law thinking.⁶

¹ Michael C. Dorf, “Pretext and Remedy in the Census Case and Beyond”, Take Care (July 7, 2019) (<https://takecareblog.com/blog/pretext-and-remedy-in-the-census-case-and-beyond>).

² *Id.*

³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

⁴ *Id.*

⁵ *Washington v. Davis*, 426 U.S. 229 (1976).

⁶ *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994).

Each of these cases takes a different approach to determining the state actor's intent. The Court in *Trump v. Hawaii* mentioned, but decided not to weight heavily the President's statements that demonstrated ample hostility towards immigrants of a particular faith.⁷ The Court in *Washington v. Davis* took a more balanced approach towards the assessment of intent, weighing the racially disparate effects of a police admissions test against the other steps taken to mitigate the problem of an unrepresentative police force.⁸ And the Court in *West Lynn Creamery* took the stated intent of the drafters of the policy at their word, finding unconstitutionally protectionist a state policy that conjoined an otherwise-permissible tax with an otherwise-permissible subsidy.⁹

This Note argues that such a strict approach, preserving intent rather than allowing it to be purged through process, is preferable in cases where animus is explicit. Doing so allows for a more robust regime of constitutional protection while not opening the floodgates that the Court contemplated in *Washington v. Davis*. The requirements of *Washington v. Davis* and its successor cases are strict enough to prevent that from occurring while allowing redress for cases where the animus is clear without allowing it to be cleansed from the record. Overall, the framework provided in this Note is an effort to preserve explicit declarations of intent as a highly meaningful tool in any relevant intent analysis at time when there are early indications that their place might be weakened. Doing so is both simpler for courts and more effective for those seeking relief when targeted by unfair state action.

⁷ *Trump v. Hawaii*, at 2417.

⁸ *Washington v. Davis*, at 242.

⁹ *West Lynn Creamery*, at 190.

II. BACKGROUND

a. Trump v Hawaii

In 2017, President Trump signed into law Executive Order 13769.¹⁰ The full title, “Protecting the Nation From Foreign Terrorist Entry Into the United States”, gives a good sense of its supposed intentions.¹¹ The Order banned travelers from seven Muslim-majority countries pending a review of the immigration process, checking for the sufficiency of information provided by foreign governments about their nationals seeking to enter the country, done by the Secretary of Homeland Security.¹² This order was immediately challenged in court.¹³ After the Ninth Circuit declined to lift a temporary restraining order, the President revoked Executive Order 13769 and replaced it with Executive Order 13780.¹⁴¹⁵ This new Order called for the same review of the immigration information provided by foreign governments while reducing the list of countries with temporary 90-day restrictions to six—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—while including a waiver process for individual travelers from the affected nations.¹⁶ This order, too, was challenged, with District Courts in Washington and Maryland issuing nationwide preliminary injunctions and their corresponding Courts of Appeal upholding those injunctions.¹⁷¹⁸

The Executive Orders were heavily challenged for good reason. They were the fulfillment of then-candidate Trump’s promise to impose a “total and complete shutdown” on

¹⁰ Exec. Order No. 13769, 82 C.F.R. 8977 (2017).

¹¹ *Id.*

¹² *Id.*

¹³ *Washington v. Trump*, 847 F. 3d 1151 (2017).

¹⁴ *Id.* at 3.

¹⁵ Exec. Order No. 13780, 82 C.F.R. 13209 (2017).

¹⁶ *Id.*

¹⁷ *International Refugee Assistance Project (IRAP) v. Trump*, 857 F. 3d 554 (2017).

¹⁸ *Hawaii v. Trump*, 859 F. 3d 741 (2017).

Muslims entering the United States.¹⁹ Originally announced in response to a mass shooting in San Bernadino, California, the idea behind this ban was supposedly to prevent future terrorist violence –the “Protecting the Nation Against Foreign Terrorist Entry” of the Executive Order’s title.²⁰ This plan was criticized as racist, religiously discriminatory, a “betrayal of bedrock constitutional principles”, and “un-American”.²¹ Despite this opposition, after his statements Trump surged to his largest lead to that point in the GOP primary.²² Upon taking office, Trump enacted this policy without delay, passing the above-mentioned Executive Orders.²³ To dispel any doubt as to the intent of these Executive Orders, presidential advisor Rudy Giuliani told Fox News that President Trump had instructed him to form a commission to enact the Muslim ban through legal means, the result of which was Order 13769.²⁴ By focusing on regions of the world that were Muslim-majority rather than specifying the exclusion of the religion itself, Giuliani assured his boss, and the national news audience, that the measure was “perfectly sensible” as well as “perfectly legal”.²⁵

¹⁹ Amrit Chang, “Trump’s Lawyers Say The Muslim Ban Has No Bias, But His Tweets Show Otherwise”, ACLU (November 30, 2017), <https://www.aclu.org/news/immigrants-rights/trumps-lawyers-say-muslim-ban-has-no-bias-his-tweets-show-otherwise>

²⁰ *Id.*

²¹ “NH, SC and Iowa GOP chairs criticize Trump’s plan for Muslims”, Theodore Schleifer, CNN (December 7, 2015), (<https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-travel-ban-early-states/index.html>).

²² Dan Balz and Scott Clement, *In Face of Criticism, Trump Surges to his Biggest Lead Over GOP Field*, THE WASHINGTON POST, December 15th, 2015 (https://www.washingtonpost.com/politics/in-face-of-criticism-trump-surges-to-his-biggest-lead-over-the-gop-field/2015/12/14/b9555e30-a29c-11e5-9c4e-be37f66848bb_story.html).

²³ Exec. Order No. 13769; Exec Order No. 13780.

²⁴ Jim Dyer, *First Came Giuliani’s Input on the Immigration Order. Now There’s the Court Test.*, THE NEW YORK TIMES, February 9th, 2017 (<https://www.nytimes.com/2017/02/09/nyregion/rudolph-giuliani-donald-trump-travel-ban.html>)

²⁵ *Id.*

Plenty of commentators – and courts – disagreed with this legal assessment.²⁶ After the expiration of the temporary restrictions in Executive Order 13780, the President issued Proclamation 9645.²⁷ This Proclamation, given the wordy full title “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats”, attempted to functionally refresh the bans from the original Executive Orders through a more robust procedure.²⁸ The President had requested that the acting Secretary for Homeland Security issue recommendations as to which countries remained so deficient in their information-sharing practices as to make advisable a bevy of specific restrictions on their entry to the United States.²⁹ After accepting the recommendations, the President issued the Proclamation, subjecting travelers from Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen to broad-scale restrictions on travel to the United States with a case-by-case waiver process available.³⁰

This Proclamation was also challenged.³¹ Its opponents characterized it as a straightforward extension of the previous Executive Orders’ attempts to make legal the clearly discriminatory “Muslim ban”.³² Following a suit by advocacy organizations on behalf of the family members of newly-excluded travel aspirants in Hawaii, the District Court issued another

²⁶ Amrit Cheng, “Trump’s Lawyers Say The Muslim Ban Has No Bias, But His Tweets Show Otherwise”, ACLU (November 30, 2017), <https://www.aclu.org/news/immigrants-rights/trumps-lawyers-say-muslim-ban-has-no-bias-his-tweets-show-otherwise>.

²⁷ Proclamation No. 9645, 82 C.F.R. 45161 (2017).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *See* Cheng, *supra* note 19.

³² *Id.*

nationwide preliminary injunction preventing the Provision from taking effect.³³ The appeals court affirmed this judgement, and the Supreme Court granted certiorari.³⁴

The Supreme Court upheld the constitutionality of the Proclamation. After dispensing with a variety of statutory-interpretation questions, it found, despite the President's clear failure to live up to the nation's supposed ideas of religious tolerance, deference to the executive in the realm of national security justified the application of rational basis scrutiny.³⁵ Under this forgiving standard, the Proclamation was allowed to take effect³⁶, meaning that, whatever the mechanism, the Court had allowed the executive action to be cleansed of the original discriminatory statements.

b. Washington v. Davis

The landmark case in the facially-neutral equal protection context, *Washington v. Davis* reintroduced intent into the equal protection analysis even when the challenged state action did not explicitly single out a suspect classification for differential treatment.³⁷ This was a departure from previous cases – *Palmer v. Thompson* perhaps the most notable – where intent was found to be irrelevant to the equal protection inquiry.³⁸

The facts of *Washington v. Davis* reveal why this was a case ripe for the Supreme Court to reintroduce the intent inquiry. The City of Washington, DC, administered to its police officer

³³ *Hawaii v. Trump*, 878 F. 3d 662 (2017).

³⁴ *Trump v. Hawaii*, at 2417.

³⁵ *Id.* at 2419.

³⁶ *Id.* at 2423.

³⁷ *Washington v. Davis*, at 229.

³⁸ *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

recruits a test (“Test 21”) of “communications skills” before offering them employment.³⁹ If they scored below passing on the test, they were not offered employment with the city’s police force.⁴⁰ This test screened out a higher proportion of prospective Black officers than it did white officers.⁴¹

Screened-out prospective Black officers sued, claiming that the test’s discriminatory impact sufficed to comprise a constitutional violation under the Equal Protection clause. They cited as evidence the fact that the city’s police force was disproportionately white compared to the city itself and the areas surrounding it.⁴² They also advanced the claim that Test 21, originally designed as a test of “verbal ability, vocabulary, reading and comprehension” for use by the Civil Service Department, was culturally biased to the benefit of white applicants and was shown to have little relation to the job performance of those prospective officers who did pass.⁴³

The city countered with mitigating facts designed to show that Test 21 was not intended to function as a covert discriminatory screen in the application process. They highlighted that their overall recruitment strategy had produced incoming police force classes that were 44% Black among the age range from 20 to 29, which was approximately proportionate to the proportion of African-Americans in city combined with the 50-mile surrounding geographic radius in which they were concentrating their recruitment efforts.⁴⁴ They also asserted that Test 21 itself was not designed to have cultural biases in favor of white applicants and that it was a

³⁹ *Washington v. Davis*, at 234.

⁴⁰ *Id.*

⁴¹ *Id.* at 236.

⁴² *Id.*

⁴³ *Id.* at 235.

⁴⁴ *Id.* at 236.

useful part of determining which applicants would last through the intensive 17-week training process even if it was shown to have no relation to later job performance.⁴⁵

The city won in district court. Although the court found that the evidence of disparate impact was sufficient to shift the production burden to the city, it ultimately determined that the evidence of active efforts to hire and maintain a diverse police force in relative, if not exact, proportion to the relevant geographic area for officers counted as sufficient proof of a lack of discriminatory intent in the retention of Test 21 as to defeat the equal protection claim.⁴⁶ It concluded that “the proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability” as a justification for its decision.⁴⁷

The screened-out officers appealed and won at the DC Circuit Court of Appeals. That court determined that intent was irrelevant.⁴⁸ What mattered was the fact of the disparate impact -- four times as many otherwise-qualified Black applicants failed to pass the test than did similarly-qualified white applicants.⁴⁹ The court left open the idea that the city could show that the test was sufficiently related to job performance so as to justify it, but determined that it had not met this burden through its production of evidence showing the test’s relevance to the training program.⁵⁰ And it did not assign much weight to the city’s evidence that it had made material efforts to form a diverse corps of police officers, claiming that it had no bearing on the case at hand.⁵¹

⁴⁵ *Id.*

⁴⁶ *Davis v. Washington*, 348 F. Supp 15.

⁴⁷ *Id.* at 19.

⁴⁸ *Davis v. Washington*, 512 F.2d 956.

⁴⁹ *Id.* at 958.

⁵⁰ *Id.* at 963.

⁵¹ *Id.* at 960.

The Supreme Court reversed. In its decision, the Court relied on the lack of evidence of intentional racial discrimination, holding that such intent was a necessary part of any equal protection inquiry.⁵² They provided a bevy of historical cases to support this conclusion⁵³, including *Strauder v. West Virginia*⁵⁴, distinguishing away those that indicated intent was irrelevant in the establishment of an equal protection violation.⁵⁵

The Court would soon tighten the intent requirement. In *Feeney*, it held that the illicit intent must have been a but-for cause (rather than a regrettable side effect) of the challenged state action.⁵⁶ And in *Arlington Heights*, it ruled that such intent must be shown to have been motivating for a sufficient proportion of the relevant decisionmakers to constitute an irrebuttable intent claim – otherwise, the burden shifts to the government to make a showing that they would have undertaken the action even without the animus.⁵⁷

Though some scholars have lamented the impact of the intent-mandatory regime, claiming that it results in undesirable denials of meritorious impact-focused equal protection claims, it remains the law today.⁵⁸

c. West Lynn Creamery

⁵² *Washington v. Davis* at 239.

⁵³ *Id.*

⁵⁴ *Strauder v. West Virginia*, 100 U.S. 303 (1880).

⁵⁵ *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁵⁶ *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

⁵⁷ *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 255 (1977).

⁵⁸ *See Katie R. Eyer, Ideological Drift and the Forgotten History of Intent*, 51 Harv. Civil Rights – Civil Liberties L. R., 1 (2001) (arguing that intent as a component of equal protection analysis was promoted by racial justice advocates in the wake of *Brown* to complicate accounts that argue against the modern intent-mandatory regime).

The least-discussed case on this list, *West Lynn Creamery*, was a 1994 case addressing the constitutionality of a Massachusetts tax-and-subsidy scheme for milk products.⁵⁹ Milk purchasers sued Massachusetts on the grounds that a system where all dairy purchasers were taxed in order to provide a subsidy directly to Massachusetts farmers was a violation of the Dormant Commerce Clause.⁶⁰ Both subsidies and non-discriminatory taxes are permissible on their own, but the plaintiff dairy buyers alleged that the structure of the Massachusetts scheme showed intent to create a tariff, which is unconstitutional.⁶¹

Relying on *Bacchus Imports*, the Court determined that the scheme was a tariff. In *Bacchus Imports*, they found unconstitutional Hawaii's scheme of taxing all liquor at wholesale 20% with an exemption for a specific type of brandy made from a Hawaiian shrub bush as well as pineapple wine.⁶² They extended this precedent to the facts of *West Lynn Creamery*, finding no difference between the initial exemption for the Hawaii-specific liquors and the rebate scheme employed to protect the Massachusetts dairy industry.⁶³ Given that there was protectionist intent, the unconstitutionality followed, despite the facial permissibility of both elements independently.

III. Frameworks

Each of these cases, or lines of cases, takes a different approach to determining intent. But what were those approaches? And how do they bear on the ultimate outcome of each case?

⁵⁹ *West Lynn Creamery*, at 186.

⁶⁰ *Id.* at 197.

⁶¹ *Id.*

⁶² *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263.

⁶³ *West Lynn Creamery* at 197.

Walking through their reasoning makes these differences, and their potential legal relevance, clearer.

a. Avoidance in Trump v. Hawaii

The plaintiff family members in *Trump v. Hawaii* brought, inter alia, a claim that the Proclamation, as well as the two Executive Orders before it, violated the Establishment Clause of the Constitution.⁶⁴ Relying on the fact that five of the seven countries subject to the final restrictions were Muslim-majority, they claimed that these actions were “religious gerrymanders” designed to exclude otherwise-statutorily-qualified Muslims from entering the United States.⁶⁵

The plaintiffs were attempting to avail themselves of long-established law that government actions undertaken out of religious prejudice were subject to heightened scrutiny by courts. In *McCreary County v. ACLU*, the Supreme Court held that a Kentucky county’s display of the Ten Commandments on the walls of its courthouse was unconstitutional.⁶⁶ After walking through the specific choices made by the county in the design of its displays, with a focus on secular alternatives the county could have but did not pursue, the Court found the display of the Commandments to be a violation of the Constitution because its “predominant purpose” was to advance religion per *Lemon*.⁶⁷

⁶⁴ *Trump v. Hawaii*, at 2415.

⁶⁵ *Id.* at 2417.

⁶⁶ *McCreary County v. ACLU*, 545 U.S. 844 (2005).

⁶⁷ *Id.* at 882.

In *Trump v Hawaii*, the plaintiffs could draw on a vast quantity of evidence showing both specific animus motivating the Proclamation itself as well as general anti-Muslim hostility from the President who issued the order. During the 2016 campaign, then-candidate Trump asserted on CNN that “Islam hates us”, referring to the United States.⁶⁸ To clarify that he was promoting bigotry against most Muslims, he added in response to a request for clarification about whether he only meant “radical Islam” with “it’s very hard to define. It’s very hard to separate. Because you don’t know who’s who”.⁶⁹ After his Republican National Convention speech, he was asked whether he was attempting to walk back his proposed Muslim ban.⁷⁰ He clarified that he didn’t “think [his new proposal was] a rollback. In fact, you could say it was an expansion”, adding that while “our Constitution is great” and something to “cherish”, it “doesn’t necessarily give us the right to commit suicide”.⁷¹ The language of “total and complete shutdown of Muslims entering the United States” remained on the Trump campaign website until 2017, after he assumed the office of the Presidency.⁷²

These facts did not escape judicial notice. In its *Trump v Hawaii* opinion, the Court observed that President Trump had engaged in a general practice of stoking anti-Muslim hostility, often ineffectually trying to conceal it behind national security justifications.⁷³ They also noted that the Proclamation, as the direct descendant of Executive Orders 13769 and 13780,

⁶⁸ “Donald Trump: ‘I think Islam hates us’”, Theodore Schleifer, CNN, (March 10, 2016) (<https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html>).

⁶⁹ *Id.*

⁷⁰ Meet the Press, “Meet the Press – July 24th, 2016”, MSNBC. (<https://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706>)

⁷¹ *Id.*

⁷² “Trump website takes down Muslim ban statement after reporter grills Spicer in briefing”, Christine Wang, MSNBC (May 8, 2017) (<https://www.cnbc.com/2017/05/08/trump-website-takes-down-muslim-ban-statement-after-reporter-grills-spicer-in-briefing.html>)

⁷³ *Trump v. Hawaii*, at 800.

was quite clearly within the scope of what the Trump advisor had called finding a way to “do it legal”.⁷⁴

These facts did not bear on its final determination, however. The Court instead relied on the “deferential standard of review” provided by *Kleindienst v. Mandel*.⁷⁵ In that case, the Court upheld the denial of a visa to a “radical Marxist” Belgian university professor against the challenge presented by American professors who claimed their right to receive information was violated by the Immigration and Nationalization Service’s denial of his entry and thus his right to speak on college campuses.⁷⁶ They justified this with the notion that the President, granted great power in matters of national security, needed to be flexible to respond to changing global conditions.⁷⁷

In *Trump v. Hawaii*, the Court’s application of a modified version of the *Mandel* standard amounted to a functional avoidance of the intent question. The standard application of *Mandel* would evaluate if the policy is facially legitimate and “bone fide”; the Proclamation, which employed traditional procedures of national security review, would qualify.⁷⁸ However, owing to the history of animus the Court saw it as appropriate to “look behind” the Proclamation’s facial legitimacy and conduct rational basis review.⁷⁹ Under this permissive standard, the only way of striking down the policy would be if it constituted a “bare desire to harm a politically unpopular group” – that is, was explicable only by the animus shown during the adoption of the policy.⁸⁰

⁷⁴ *Id.*

⁷⁵ *Id.* at 802.

⁷⁶ *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972).

⁷⁷ *Id.* at 765.

⁷⁸ *Trump v. Hawaii*, at 2420.

⁷⁹ *Id.*

⁸⁰ *Id.* at 2421.

Because the policy did relate to national security concerns as found by the Department of Homeland Security review, it had a “legitimate purpose” apart from discrimination and was thus acceptable.⁸¹

The Court’s approach represents consecutive side-steps away from the question of judging intent. The invocation of *Mandel*, rather than doing a traditional Establishment Clause heightened scrutiny analysis, means the deck was stacked in favor of the Proclamation. On the third attempt, the Executive had enough experience to craft a minimally persuasive facially-neutral justification for its policy. The reintroduction of rational basis scrutiny was a mere feint with the same effect – it seemed to acknowledge the relevance of the President’s past statements (by providing justification to “look behind” the procedural legitimacy while replicating its deferential posture), for that procedure created a justification that meant the policy was not “inexplicable by anything but animus” as would be required to strike it down under rational basis review. Thus, the Court feinted towards concern about the illicit purpose while declining to balance or come to a judgment on its constitutional relevance to the challenged action.

b. The balanced approach of Washington v Davis

Washington v. Davis purported to be an extension of existing Equal Protection jurisprudence, with an intent requirement having always existed. Some commenters have cast doubt on this assertion, marking *Washington v. Davis* as a change in the Equal Protection line of cases.⁸² Regardless, the case advanced the idea that to win an Equal Protection claim a plaintiff

⁸¹ *Id.*

⁸² See Eyer, *supra* note 58.

must show both discriminatory intent as well as discriminatory impact, subject to some exceptions like a *Yick Wo*-style dramatic disparity in enforcement.⁸³

The case recommended the consideration of the “totality of the relevant facts” in the assessment of whether discriminatory intent existed.⁸⁴ Here, weighing on the side of finding the admission of Test 21 an equal protection violation was the disparity in pass rates between white and Black applicants. While disparate impact alone could not sustain an Equal Protection claim, it is “not irrelevant”, and might “for all practical purposes demonstrate unconstitutionality” when the discrimination is “very difficult to explain on nonracial grounds”.⁸⁵ Evidence in favor of treating the gap in pass rates as such included the fact that another qualification, the requirement of a high school diploma or its equivalent, acted as a pseudo-control for communications skills and reading comprehension, which the test purported to measure, leaving any gaps more likely the result of cultural biases.⁸⁶ Similar, too, was the lack of correlation between Test 21 results and job performance score – the lack of predictive utility for a catch-all metric (into which “communication skills” is surely factored) of effectiveness was evidence of possible illicit motive in the retention of the test.⁸⁷

However, these factors were balanced by the DC Police Department’s lack of evident discrimination and its demonstrated efforts to recruit and retain more Black officers. While the test was not a perfect measure of linguistic ability, it was clearly at least rationally related to the idea of promoting linguistic efficacy.⁸⁸ There was no evidence anywhere in the record that the

⁸³ *Washington v. Davis*, at 254.

⁸⁴ *Id.* at 242.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 246.

⁸⁸ *Id.*

test was maintained for any other purpose.⁸⁹ The Court credited the Department's recruitment of a more diverse selection of police officers from the city and its surrounding areas, noting that it made an active effort to enroll Black people into the trainee program.⁹⁰ It also factored in that these efforts were effective – the incoming class of officers approximately matched the racial demographics of the relevant geographic area for recruitment.⁹¹ Taken together, these factors outweighed any potential inference of discriminatory intent, and thus the administration of Test 21 was upheld under the Equal Protection clause.

The balancing test, as well as the intent requirement applied in *Washington v. Davis*, has some advantages. One of them emphasized by the Court was the need for a simple limiting principle on claims based around disparate impact alone. Because of the correlation between race and socioeconomic status, any policy enacted that has a disproportionate effect on the poor – this is most of them – will also have a disparate racial impact as well.⁹² While this is, of course, also the result of a long and persistent history of discrimination, it is possible to say that this is a matter too large for judicial rather than legislative resolution. The Court asserts as much: such broad-scale reform as might be catalyzed by an intent-blind rule should “await legislative prescription”.⁹³ However, this impulse towards deference goes too far. Because nearly any government action is rationally related to a legitimate purpose, the acceptance of a proffered explanation, even when it seems unpersuasive compared to the other evidence, leads to the

⁸⁹ *Id.*

⁹⁰ *Id.* at 247.

⁹¹ *Id.*

⁹² *Id.* at 248.

⁹³ *Id.*

discrediting of claims of impact-based equal protection claims.⁹⁴ Courts should be cautious about extending this level of deference into new contexts.

c. West Lynn Creamery and taking Massachusetts's word for it

West Lynn Creamery seemed to proceed on normal Dormant Commerce Clause grounds. States are forbidden from imposing tariffs on the products of other states – indeed, any attempt to do this would be so “patently unconstitutional” that Supreme Court cases reveal “not a single attempt by any State to enact one”.⁹⁵ Taxes that do not discriminate between states are constitutional, however, as are subsidies provided by a state to its local industries. Most of the Dormant Commerce Clause cases taken by the Court attempt to adjudicate the line between permissible taxes and subsidies and those that seek to gain the benefits of tariffs through such seemingly constitutionally tolerable means.⁹⁶ *Bacchus Imports*, the Hawaii liquor tax case struck down as a violation of the DCC, was found to operate exactly in this way: by creating a tax that exempted local liquor production and distribution at the expense of imported alcoholic beverages, the state created a functional tariff.⁹⁷

The Court seemed to smoothly apply this principle in *West Lynn Creamery*. The tax was non-discriminatory; the money from the tax went to a fund specifically for subsidies; the subsidies were paid out directly to Massachusetts dairy farmers.⁹⁸ What's more, Massachusetts officials were on the record as to the protectionist aims of the tax and subsidy policy: because

⁹⁴ See, e.g., Eyer, *supra* note 49.

⁹⁵ *West Lynn Creamery*, at 193.

⁹⁶ *Id.* at 194.

⁹⁷ *Bacchus Imports*, at 273.

⁹⁸ *West Lynn Creamery*, at 194.

“the industry was in serious trouble” they needed to “act on the state level to preserve the local industry” through the dairy equalization program.⁹⁹ Seems clear enough – they wanted to protect their local industry, and they did so through the imposition of requirements that raised the price of out-of-state goods relative to in-state goods: a tariff, not allowed any way you slice it.

But deeper analysis reveals the importance of the stated intent to bind the Court’s reasoning together. The degree of proximity that would be required to mark the two independently-permissible actions as linked is not clear from the Court’s opinion. What if, at the beginning of a state legislative session, lawmakers decided they needed a revenue-raising tax, which they decided to impose on sellers of milk, then at the end of the session realized that state dairy producers were flagging and wished to prop them up with a subsidy, both for the public health benefits of consistently-available nearby fresh milk and for the stimulus to the local economy created by dairy employment? What if two days elapsed between the independent passage of these programs? Two years? In his concurrence, Justice Scalia notes that in his view *West Lynn Creamery* was nearing the line of what the Dormant Commerce Clause could forbid, saying that in his view the exact scheme might have been allowable had the tax revenue gone directly into the public fisc rather than a special fund for subsidy payouts, under the theory that doing so would increase public demand (and thus legislative competition) for the money to be spent on other, non-protectionist, programs. Is this a verifiably correct model of state legislative behavior – do citizens exert democratic pressure on their representatives for optimal distribution of tax revenue? The statements of the legislators meant that these questions did not need to be

⁹⁹ *Id.* at 190.

resolved. Because the “avowed purpose” and “undisputed effect” of the setup was to function as a tariff, the Court could keep it simple.

IV. Argument

a. Courts should favor crediting parties’ explicit declarations of intent in “purging the taint” scenarios

West Lynn Creamery left questions unanswered. The level of connection between two independent government actions that together function as a tariff remains unclear in the law. But its simplicity has its virtues: the state legislature declared its intention to do something unconstitutional, it did the unconstitutional thing, and the Supreme Court struck it down. The resolution of a different factual setup – an accidental tariff? A stealthier state legislature? – is best resolved in an individual case that presents those facts. Courts should react to what is in front of them.

This is especially important considering the strictures imposed by *Washington v. Davis*. The inability to find a violation of Equal Protection from effect alone, and the difficulty of proving intent in situations where the default rule is to assume the challenged state action was rationally related to a legitimate purpose, means Equal Protection cases are difficult to win, especially after the heightened requirements of *Feeney* and *Arlington Heights*. Courts may think these burdens of proof are required to prevent an explosion of disparate impact cases based on correlations between two characteristics – veteran status and maleness in *Feeney*¹⁰⁰, race and

¹⁰⁰ *Feeney*, at 260.

socioeconomic status in *Arlington Heights*.¹⁰¹ Whether they are right is a subject for a different Note. It does seem clear, however, that if intent is going to be required, then clear, explicit evidence of discriminatory intent should not be allowed to be laundered through the passage of time or the application of some formal procedure with pre-ordained results.

Which is what makes *Trump v. Hawaii* alarming. This case had as many expressions of animus as it is perhaps possible to see – indeed, it might be understood as the outer bound of discrimination possible by a state actor. (In the majority opinion, Chief Justice Roberts chides the dissent for invoking *Korematsu*, which is a difficult criticism to render when the government official who proposed the policy and signed the Executive Orders and final Proclamation *himself* compared the proposal to Japanese internment).¹⁰²¹⁰³ Even despite this, the Court allowed for the policy to be implemented after it was run through the filters of official Department of Homeland Security process.

That the Court relied primarily on deference to the executive on matters of national security and immigration is little comfort. It has, at least tentatively, signaled its willingness to expand that willful blindness in other intent cases. In *Department of Commerce et. al. v. New York et. al.*, the Court reviewed the Department of Commerce’s proposed addition of a citizenship question to the once-a-decade Census and remanded to lower courts for further findings.¹⁰⁴ The stated rationale – to find out how many non-citizens were living in the country

¹⁰¹ *Arlington Heights*, at 259.

¹⁰² *Trump v. Hawaii*, at 2423.

¹⁰³ “Trump defends Muslim plan by comparing himself to FDR”, Rebecca Kaplan, CBS News (December 8, 2015), (<https://www.cbsnews.com/news/donald-trump-defends-muslim-plan-by-comparing-himself-to-fdr/>)

¹⁰⁴ *Department of Commerce v. New York*, No. 18–966, 588 U.S. (2019)

for the purpose of effective enforcement of the Voting Rights Act – was found to be a pretext.¹⁰⁵ The real intent of the policy, based on the public statements of the involved parties, was to lower the census response rates of immigrants and non-white individuals through the implied threat of deportation (that would seem to attend any undocumented person marking “non-citizen” on any form that is an official government document).¹⁰⁶ While the Court’s reluctance to accept the initial pretext seemed to be a positive development, it hinted at a willingness to ignore intent in the future.¹⁰⁷ The defense-of-the-Voting Rights Act justification was absurd on its face – the Secretary of Commerce had been designing this plan since his first week in office, and his materials betrayed no indication that effective enforcement of seminal voting rights legislation was on his mind.¹⁰⁸ The decision to remand rather than simply deny the proposed question, some commentators have argued, was essentially a decision to permit the Secretary a chance to concoct a more persuasive, effective, untruth.¹⁰⁹

Sticking to a *West Lynn Creamery* framework of making intent count seems preferable to allowing multiple bites at the apple for laundering illicit motivation. Doing so prevents potential movement away from enforcement of Equal Protection principles even greater than has already happened following *Washington v. Davis* and its progeny, and avoids the problem that those cases sought to head off at the pass. An intent-strict analysis of *Trump v. Hawaii* allows for courts to recognize the obvious: that actions taken from a place of obvious animus should not be

¹⁰⁵ *Id.*

¹⁰⁶ *See* Dorf, *supra* note

¹⁰⁷ *Id.*

¹⁰⁸ Department of Commerce v. New York (2019).

¹⁰⁹ *See* Dorf, *supra* note

photocopied into legitimacy by the passage of time. The Muslim ban remains the Muslim ban no matter how often the Secretary of Homeland Security is called into action to write a report.

V. Conclusion

Analysis of intent has seen its place shift over the past 45 years of constitutional law. *Washington v. Davis* and its successor cases made its proof mandatory for nearly every claim of a violation of Equal Protection by a facially neutral law. It has remained a major part of Dormant Commerce Clause jurisprudence during that time. And courts have started to think harder about what must be done to “purge the taint” of illicit intent when it coats a challenged action.

Each of the different cases examined took a different approach to its intent analysis. The Court in *Washington v. Davis* took a deferential, balancing view, finding that while the policy of administering a Civil Service Department communications test produced racially inequitable results while not directly predicting job performance, the other diversity-promoting actions of the city police department meant that intent cannot be inferred from the retention of that policy. In *West Lynn Creamery*, the Court struck down a scheme that implemented an otherwise-permissible facially neutral tax and an otherwise-permissible subsidy to in-state milk producers on the grounds that the stated intent of the legislature was to create the functional equivalent of a tariff, in the process neglecting important questions of when similar schemes would be allowed. And in *Trump v. Hawaii*, the Court declined to factor into its analysis the reams of evidence that the challenged Presidential Proclamation was motivated by religious bigotry, instead affording the Executive great deference in the realm of national security.

Going forward, courts should adopt a more strict analysis of intent when the history of the challenged regulation contains explicit evidence of animus. Doing so would seem to avoid the strange situation, seemingly possible under current doctrine, where intent can be deemed irrelevant and the taint sufficiently purged more easily in cases that deal with core liberties (like the Establishment Clause) than with a protectionist tax measure designed to prop up a stalling local industry. Doing so would not threaten a superabundance of litigation, as was the worry in *Washington v. Davis*, while allowing for the preservation of Equal Protection and other rights in a legal climate increasingly foreboding for their claims. If public officials are going to take credit for their policies, they must take accountability for their statements.

Applicant Details

First Name	Clifford
Last Name	Perez
Citizenship Status	U. S. Citizen
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Contact Phone Number	8458532529

Applicant Education

BA/BS From	The Catholic University of America
Date of BA/BS	May 2014
JD/LLB From	Notre Dame Law School
	http://law.nd.edu
Date of JD/LLB	May 18, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Notre Dame Journal of Law, Ethics, and Public Policy
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	Yes
--------------------------------------	-----

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Michael, McAuliffe
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Clifford J. Perez
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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student at Notre Dame Law School. I am writing to apply for a clerkship in your chambers beginning in 2024.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. You will receive letters of recommendation from Professor James Kelly of Notre Dame Law School, Professor Michael Kirsch of Notre Dame Law School, and the Honorable Judge Michael McAuliffe.

If I can provide additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,
Clifford Perez

Clifford J. Perez

7519 Bradley Boulevard | Bethesda, MD 20817 | cperez24@nd.edu | (845) 853-2529

EDUCATION

University of Notre Dame Law School

Juris Doctor Candidate

GPA: 3.53

Notre Dame, IN

May 2024

- Honor Roll: Fall 2022; Spring 2023
- Notre Dame Journal of Law, Ethics, and Public Policy – Managing Senior Editor
- Community Development Clinic, Spring 2023
- Space Law Society – President
- Galilee Public Interest Immersion Program
- First Generation Professionals

The Catholic University of America

Bachelor of Science in Business Administration in Economics, cum laude

GPA: 3.67

Washington, DC

May 2014

- The Henry Spiegel Award for Outstanding Academic Achievement in Economics
- Dean’s List: 2010–2014
- Pi Gamma Mu: International Honors Society in Social Sciences
- Phi Eta Sigma: National Honor Society
- Catholic University Men’s Rugby Team – President

EXPERIENCE

Carlton Fields

Summer Associate

Washington, DC

May 2023 – Present

- Draft legal memorandums for client matters on topics such as: the use of predecessor audit reports in current financial statements; broker-dealer’s financial duties in California; and the statutes of limitations for various securities claims
- Review and analyze complaints and answers from ongoing cases
- Assist attorneys in litigation and transactional matters

Montgomery County Circuit Court, 6th Judicial Circuit

Judicial Intern for the Honorable Judge Michael J. McAuliffe

Rockville, MD

May 2022 – July 2022

- Provided legal research for criminal, civil and procedural matters, including the admissibility of hearsay evidence in probation hearings, patient privilege for prison psychologists and compensation of trust auditors
- Assisted in jury selection, hearings, and other trial preparation activities
- Created hearing preparation reports which summarize case history, the parties’ positions, cited laws and other applicable laws

The Concourse Group LLC

Senior Analyst

Annapolis, MD

April 2016 – August 2021

- Created a comprehensive housing asset report for the House Arms Subcommittee
- Managed all technical responses to facilitate the federal government’s needs on military housing and to ensure proper management of federal government assets

Economic Analyst & Field Program Manager

- Conducted quantitative research, economic modeling and technical reporting to develop master plans, inventory assessments and economic analyses for US Army housing
- Managed and led onsite assessments of US military housing to verify existing housing information
- Developed technical responses for government contract proposals

INTERESTS/ AWARDS: Rugby; Camping; Guitar; Eagle Scout

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UNIVERSITY OF NOTRE DAME

NOTRE DAME, INDIANA 46556

Perez, Clifford J.
Student ID: XXXXX0884

Date Issued: 02-JUN-2023
Page: 1

Birth Date: 11-21-XXXX

Issued To: Clifford Perez
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cperez24@nd.edu

Course Level: Law
Program: Juris Doctor
College: Law School
Major: Law

CRSE	ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS				OVERALL TOTALS			
						ATTEMP HRS	EARNED HRS	GPA HRS	GPA	ATTEMP HRS	EARNED HRS	GPA HRS	GPA
UNIVERSITY OF NOTRE DAME CREDIT:													
Fall Semester 2021													
Law School													
LAW	60105	Contracts	4.000	B+	13.332								
LAW	60302	Criminal Law	4.000	B+	13.332								
LAW	60703	Legal Research	1.000	B	3.000								
LAW	60705	Legal Writing I	2.000	B+	6.666								
LAW	60901	Torts	4.000	B-	10.668								
Total					46.998	15.000	15.000	15.000	3.133	15.000	15.000	15.000	3.133
Spring Semester 2022													
Law School													
LAW	60307	Constitutional Law	4.000	B+	13.332								
LAW	60308	Civil Procedure	4.000	B+	13.332								
LAW	60707	Legal Resrch & Writing II-MC	1.000	B+	3.333								
LAW	60906	Property	4.000	B+	13.332								
LAW	70318	Legislation & Regulation	3.000	B+	9.999								
LAW	75700	Galilee	1.000	S	0.000								
Total					53.328	17.000	17.000	16.000	3.333	32.000	32.000	31.000	3.236
Fall Semester 2022													
Law School													
LAW	70101	Business Associations	4.000	A	16.000								
LAW	70605	Federal Income Taxation	3.000	A	12.000								
LAW	70903	Military Law	2.000	A-	7.334								

CONTINUED ON PAGE 2

UNIVERSITY OF NOTRE DAME

NOTRE DAME, INDIANA 46556

Perez, Clifford J.
Student ID: XXXXX0884

Birth Date: 11-21-XXXX

Date Issued: 02-JUN-2023
Page: 2

CRSE	ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS				OVERALL TOTALS			
						ATTEMP HRS	EARNED HRS	GPA HRS	GPA	ATTEMP HRS	EARNED HRS	GPA HRS	GPA
University of Notre Dame Information continued:													
LAW	73136	Cybersecurity & Data Protect.	2.000	A	8.000								
LAW	75710	Intensive Trial Ad	4.000	S	0.000								
LAW	75751	Journal Law/Ethics/Public Pol	1.000	S	0.000								
		Total			43.334	16.000	16.000	11.000	3.939	48.000	48.000	42.000	3.420
Honor Roll													
Spring Semester 2023													
Law School													
LAW	70107	Securities Regulation	3.000	A-	11.001								
LAW	70111	Real Estate Transactions	3.000	A-	11.001								
LAW	70807	Professional Responsibility	3.000	A-	11.001								
LAW	75721	Community Development Clinic I	5.000	A	20.000								
LAW	75751	Journal Law/Ethics/Public Pol	1.000	S	0.000								
LAW	76101	Directed Readings	2.000	A	8.000								
		Total			61.003	17.000	17.000	16.000	3.813	65.000	65.000	58.000	3.529
Honor Roll													
Fall Semester 2023													
IN PROGRESS WORK													
LAW	74411	LE Law of International Finance	3.000	IN	PROGRESS								
LAW	74412	LE Crypto, Blockchain & Finance	2.000	IN	PROGRESS								
LAW	74425	LE Business and Human Rights	2.000	IN	PROGRESS								
LAW	74433	LE Law of International Trade	3.000	IN	PROGRESS								
LAW	74741	LE Journal Law Ethics Pub Policy	1.000	IN	PROGRESS								
LAW	74821	LE Jurisprudence	3.000	IN	PROGRESS								
		In Progress Credits	14.000										
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NOTRE DAME	Ehrs:	65.000	QPts:	204.663									
	GPA-Hrs:	58.000	GPA:	3.529									
TRANSFER	Ehrs:	0.000	QPts:	0.000									
	GPA-Hrs:	0.000	GPA:	0.000									
OVERALL	Ehrs:	65.000	QPts:	204.663									
	GPA-Hrs:	58.000	GPA:	3.529									
***** END OF TRANSCRIPT *****													

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The most frequently used codes are:

AF	Angers, France
DC	Washington, DC
FA	Fremantle, Australia
IA	Innsbruck, Austria
IR	Dublin, Ireland
LA	London, England (Fall/Spring)
LE	London, England (Law-JD)
LG	London, England (Summer EG)
LS	London, England (Summer AL)
PA	Perth, Australia
PM	Puebla, Mexico
RE	Rome, Italy
RI	Rome, Italy (Architecture)
SC	Santiago, Chile
SP	Toledo, Spain

For a complete list of codes, please see the following website:

<http://registrar.nd.edu/pdf/campuscodes.pdf>

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August 1988 - Present

Letter Grade	Point Value	Legend
A	4	
A-	3.667	
B+	3.333	
B	3	
B-	2.667	
C+	2.333	
C	2	Lowest passing grade for graduate students.
C-	1.667	
D	1	Lowest passing grade for undergraduate students.
F	0	Failure
F*	0	No final grade reported for an individual student (Registrar assigned).
X	0	Given with the approval of the student's dean in extenuating circumstances beyond the control of the student. It reverts to "F" if not changed within 30 days after the beginning of the next semester in which the student is enrolled.

- I 0 Incomplete (reserved for advanced students in advanced studies courses only). It is a temporary and unacceptable grade indicating a failure to complete work in a course. The course work must be completed and the "I" changed according to the appropriate Academic Code.
- U Unsatisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

Grades which are not Included in the Computation of the Average

- S Satisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).
- V Auditor (Graduate students only).
- W Discontinued with permission. To secure a "W" the student must have the authorization of the dean.
- P Pass in a course taken on a pass-fail basis.
- NR Not reported. Final grade(s) not reported by the instructor due to extenuating circumstances.
- NC No credit in a course taken on a pass-no credit basis.

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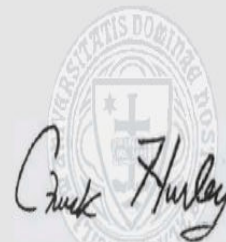
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The current grading system for the law school is as follows: A (4.000), A- (3.667), B+ (3.333), B (3.000), B- (2.667), C+ (2.333), C (2.000), C- (1.667), D (1.000), F or U (0.000).

Effective academic year 2011-2012, the law school implemented a grade normalization policy, with mandatory mean ranges (for any course with 10 or more students) and mandatory distribution ranges (for any course with 25 or more students). For Legal Writing (I & II) only, the mean requirement will apply but the distribution requirement will not apply. The mean ranges are as follows: for all first-year courses (except for the first-year elective, which is treated as an upper-level course), the mean is 3.25 to 3.30; for large upper-level courses (25 or more students), the mean is 3.25 to 3.35; for small upper-level courses (10-24 students), the mean is 3.15 to 3.45.

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CHUCK HURLEY, UNIVERSITY REGISTRAR

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The first digit of the course number indicates the level of the course.

- ENGL 0 X - XXX = Pre-College course
- ENGL 1 X - XXX = Freshman Level course
- ENGL 2 X - XXX = Sophomore Level course
- ENGL 3 X - XXX = Junior Level course
- ENGL 4 X - XXX = Senior Level course
- ENGL 5 X - XXX = 5th Year Senior / Advanced Undergraduate Course
- ENGL 6 X - XXX = 1st Year Graduate Level Course
- ENGL 7 X - XXX = 2nd Year Graduate Level Course (MBA / LAW)
- ENGL 8 X - XXX = 3rd Year Graduate Level Course (MBA / LAW)
- ENGL 9 X - XXX = Upper Level Graduate Level Course

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Notre Dame Law School
1100 Eck Hall of Law
Notre Dame, Indiana 46556

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Clifford (Cliff) Perez for a clerkship in your chambers. As brief background, I am a tenured Professor of Law at Notre Dame Law School, where my teaching and scholarship focus on tax law and policy. Earlier in my career, after four years at a large Los Angeles law firm, I served a two-year clerkship for Chief Judge Lapsley W. Hamblen, Jr., of the U.S. Tax Court, and also had other government service in Washington, DC, including a position as the Associate International Tax Counsel in the Treasury Department's Office of Tax Policy.

Cliff is a responsible and intelligent student who, I believe, would make a valuable addition to your chambers. I first met Cliff during the Fall 2022 semester when he was a student in my introductory Federal Income Tax class, a course with a heavy emphasis on reading statutes and regulations. The relatively large class size did not offer significant opportunities for interaction, although Cliff was well-prepared when called on. More importantly, he performed extremely well on the comprehensive final exam. Cliff's score was in the top 5 in a class of approximately 50 students. In preparing this recommendation, I looked back at his exam and noted one particularly noteworthy item. In one question, I asked students to explain whether the tax consequences of a particular transaction were consistent with the overall economic consequences to the taxpayer. Students often have trouble with this type of question, as it requires them to step back from a rote application of legal rules and instead consider the practical implications, a type of analysis that cannot be memorized or put into an outline in advance. Cliff was one of only a very small number of students who was able to make this conceptual jump, providing a clear and accurate explanation.

In addition to taking this introductory tax law class, Cliff asked me to supervise a Directed Reading (i.e., an independent research and writing project) during the Spring 2023 semester. Cliff was proactive in choosing a topic that aligned with his interest in business and economics. His well-written paper analyzed and critiqued the recently enacted corporate alternative minimum tax, concluding that it is an ineffective, overbroad solution to a perceived problem, and that Congress should instead enact more targeted fixes. Cliff demonstrated initiative and self-management in this project, requiring only limited involvement by me. After brainstorming possible topics with me, he tracked down a range of sources on his own and created a well-developed outline for my approval. He then turned that outline into a near-complete draft without any significant further input from me. In short, he has the ability to research and produce quality written work with only limited guidance or supervision.

Finally, I offer a few thoughts to put Cliff's overall law school performance in perspective. His 1L grades were good, although not great, with his 3.24 cumulative 1L GPA slightly below the overall 3.32 cumulative GPA of his classmates. However, his very strong performance during 2L year (3.94 and 3.81 in Fall and Spring, respectively) brought his cumulative GPA (3.53) well above the 3.36 cumulative GPA of his classmates in the Class of 2024.

In summary, Cliff is a bright and responsible student who is able to produce quality written work with only limited guidance. From a personal perspective, Cliff has always impressed me as a friendly and respectful person who would get along well with other clerks and staff in chambers. Accordingly, I am happy to recommend Cliff for a clerkship.

If you have any questions, feel free to contact me.

Sincerely,

Michael S. Kirsch
Professor of Law

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Clifford Perez – Writing Sample I

THE CORPORATE ALTERNATIVE MINIMUM INCOME TAX: AN OLD SOLUTION FOR AN OLD
PROBLEM
Clifford J Perez^{*1}

In 2022 Congress passed the Inflation Reduction Act. Part of this legislation reinstated the corporate alternative minimum tax (CAMT). The CAMT is not the first legislation of its kind, but unlike the previous versions, the new CAMT is based on the book value of the corporation. The CAMT was proposed to make billion-dollar corporations which had zero federal income taxes reported in their book income pay their fair share of taxes. A secondary purpose of the CAMT is the imposition of a tax targeted at increasing tax revenue generated from corporations. While many benefits were proposed for the CAMT, it fails to address the underlying problem with the tax code—the tax expenditures allowing some of these corporations, and many non-billion-dollar companies, to pay no federal income tax. The CAMT is an ineffective solution to addressing underlying problems in expenditures in the tax code. Congress should work towards drafting and revising better tax policy instead of using old tactics to resolve an old problem.

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¹ * Clifford Perez wrote this paper for his Spring 2023 Directed Reading for Professor Kirsch.

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INTRODUCTION

The previous corporate alternative minimum tax (CAMT) was removed by the Tax Cuts and Jobs Act (TCJA) of 2017.² In August of 2022 Congress passed the Inflation Reduction Act which included legislation to reinstate a CAMT.³ The new CAMT was reinstated with the purpose of making billion-dollar companies pay their “fair share” of taxes, since some companies that were reporting billions of dollars in revenue on their financial statements were reporting little to no income tax in their financial records.⁴

This paper will look at the CAMT which was passed as part of the Inflation Reduction Act. The first part of the paper will provide a history of the CAMT. The second part of the paper will examine the contours of the CAMT, including how it works and which companies it applies to. The third section will examine the reasoning behind passing the CAMT. The fourth section will discuss an outstanding problem with the CAMT, specifically that it transfers some of Congress’s power to an unelected, non-governmental agency. The final part will examine the effectiveness of implementing the CAMT.

² Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 131 Stat. 2083.
³ Inflation Reduction Act of 2022, Pub. L. No. 117-169, 135 Stat. 1818.
⁴ See Matthew Gardner & Steve Wamhoff, *55 Corporations Paid \$0 in Federal Taxes on 2020 Profits*, ITEP 1 (Apr. 2021).

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I. A BRIEF HISTORY

The CAMT passed within the Inflation Reduction Act is just the latest in a series of CAMTs that have been enacted in the United States. Before analyzing the new CAMT, a brief history of CAMTs is needed.

a. National Corporate Minimum Taxes Until 2017

The first corporate tax was passed in the Revenue Act of 1894⁵ but was soon found to be unconstitutional.⁶ Yet, support for an income tax continued and in 1909 a corporate excise tax was passed by the Senate and House with a proposal for a constitutional amendment “empowering Congress to levy [an] income tax.”⁷ The proposed amendment would become the sixteenth amendment after its ratification in 1913.⁸ A corporate tax has been in effect ever since.⁹

The first federal AMT, and federal corporate minimum tax, was not passed until 1969 in the appropriately named Tax Reform Act of 1969.¹⁰ The 1969 Act was a substantive and comprehensive reform of the internal revenue code (IRC).¹¹ The 1969 Act imposed an add-on

⁵ Jack Taylor, *Corporation Income Tax Brackets and Rates, 1909-2002*, STAT. INCOME BULL. (IRS), Fall 2003 at 284. While the Civil War income tax did tax “the gains and profits of all companies” they were included in the individual taxpayer’s income as a sort of “pass-through taxation.” Reuven S. Avi-Yonah, *Why Was the U.S. Corporate Tax Enacted in 1909?*, in STUDIES IN HISTORY OF TAX LAW VOL. 2, 377–92, 377–78 (John Tiley ed., 2007); quoting Act of 30 June 1864, ch. 173, § 117, 13 Stat. 223, 281–282 (repealed 1874).

⁶ *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895); Publication 1136. (Rev. 12-03).

⁷ Avi-Yonah, *supra* note 5 at 380–81.

⁸ National Archives, *16th Amendment to the U.S. Constitution: Federal Income Tax (1913)*, National Archives (last reviewed Sept. 13, 2022) [https://www.archives.gov/milestone-documents/16th-amendment#:~:text=Passed%20by%20Congress%20on%20July,impose%20a%20Federal%20income%20tax](https://www.archives.gov/milestone-documents/16th-amendment#:~:text=Passed%20by%20Congress%20on%20July,impose%20a%20Federal%20income%20tax.). “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” U.S. CONST. amend. XVI.

⁹ Taylor, *supra* note 5 at 284.

¹⁰ See Patrick Fleenor & Andrew Chamberlain, *Background on the Individual Alternative Minimum Tax (AMT)*, TAX FOUND. (May 24, 2005) <https://taxfoundation.org/background-on-individual-alternative-minimum-tax-amt/>; see also John M. Janiga, *The Corporate Alternative Minimum Tax: A Critique and Exploration of Alternatives*, 20 LOY. U. CHI. L.J. 21, 22 n.4 (1988).

¹¹ Joint Committee Report JCS-16-70: General Explanation of the Tax Reform Act of 1969 (Dec. 3, 1970) (the House and Senate Committee reports suggested that “there was no prior tax reform bill of equal substantive scope).

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minimum tax to “both individuals and corporations.”¹² The AMT was introduced because several high-income taxpayers paid zero federal income tax by using available deductions and tax credits.¹³ The AMT was an add-on tax to fix the purported problem.¹⁴ “Rather than directly addressing the problem by eliminating the deductions and credits in the tax code that were leading to the tax avoidance, Congress laid an additional layer of complexity over the regular income tax in the form of the AMT.”¹⁵

In 1986, another appropriately named act, the Tax Reform Act of 1986, made more extensive changes to the IRC, including the imposition of the CAMT that stood until its repeal in 2017.¹⁶ The 1986 Act removed the add-on minimum tax created by the 1969 Act and in its place imposed a new CAMT based on income.¹⁷ Initially the CAMT was based on the book value—similar to the current version of the CAMT—but this version only lasted until 1989.¹⁸ The 1986 CAMT eventually became “a flat [twenty percent] tax imposed on a corporation’s alternative minimum taxable income less an exemption amount.”¹⁹ The alternative minimum taxable income was based on the corporation’s taxable income with adjustments for depreciation, and

¹² *Id.* The add on tax was ten percent of the total “tax preferences received by the taxpayer less thirty-thousand dollars and the taxpayer’s regular federal income tax.” *Id.*

¹³ Fleenor & Chamberlain, *supra* note 10. The taxpayers had a gross income around \$200 thousand, roughly \$1.75 million today. *Id.*; AIER, *Cost of Living Calculator: What is Your Dollar Worth Today?*, AIER (accessed Apr. 4, 2023) https://www.aier.org/cost-of-living-calculator/?utm_source=Google%20Ads&utm_medium=Google%20CPC&utm_campaign=COLA&gclid=Cj0KCQjwi46iBhDyARIsAE3nVrYaFGHuQyux22P69R-oxkZi7qDNqGtNyjsX-3AhgHMG9wWpzb1lSy8aArLqEALw_wcB.

¹⁴ *Id.*

¹⁵ Fleenor & Chamberlain, *supra* note 10.

¹⁶ Tax Reform Act of 1986, Pub. L. No. Tax Reform Act of 1986 99–514 100 Stat 2085 [hereinafter 1986 Act]; *see infra* Part II(b) for a discussion of the repeal of the CAMT by the Tax Cuts and Jobs Act of 2017.

¹⁷ Donald J. Marples, *Tax Reform: The Alternative Minimum Tax*, CONG. RSCH. SERV. 1 (updated Dec. 4, 2017).

¹⁸ *See* Jasper L. Cummings, Jr., *The 2022 Corporate AMT*, TAX NOTES (Sep. 26, 2022) <https://www.taxnotes.com/special-reports/alternative-minimum-tax/2022-corporate-amt/2022/09/23/7f5rg>.

¹⁹ *Id.* The 1986 CAMT actually started as a book value but was abandoned after a three-year tenure. *Id.*

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other items, along with an increase for certain disallowances.²⁰ The CAMT was only applicable if it was larger than the regular tax.²¹

The CAMT was passed with the objective of making sure “that no taxpayer with substantial economic income [could] avoid significant tax liability by using exclusions, deductions, and credits.”²² The CAMT was designed to tax corporations that some Congressional Representatives felt were receiving “too much advantage of the very incentives designed to induce taxpayers to act in Congressionally approved ways.”²³ Instead of fixing the tax incentives, Congress opted to implement a CAMT.

b. The Tax Cuts and Jobs Act

The TCJA was passed into law in 2017.²⁴ It was passed as a “pro-growth reform” claiming to “significantly lower[] marginal tax rates and cost of capital.”²⁵ It was another major overhaul of the IRC.²⁶ Subtitle B of the TCJA contained one of the major reforms; repealing the existing CAMT.²⁷ The drafters of the TCJA wanted to increase corporate competitiveness and promote economic development.²⁸ The repeal of the CAMT was one of the proposed methods of achieving this goal.²⁹ Another reason was that “[t]he repeal of the AMT for corporations was primarily a result of the historic underlying policy for its implementation being greatly

²⁰ *Id.* There was also a special deduction for some insurance companies. *Id.*

²¹ *Id.*

²² Daniel L. Simmons, *The Tax Reform Act of 1986: An Overview*, 1987 BYU L. REV. 151, 192 (1987); quoting S. Rep. No. 144, 97th Cong., 1st Sess., 25-26 (1981).

²³ Simmons, *supra* note 22 at 193. “The [senate] report adds that, ‘Although these provisions provide incentives for worthy goals, they become counter-productive when individuals are allowed to use them to avoid virtually all tax liability.’” *Id.* at 193 n.195 (also citing several other reports with identical language); quoting S. REP. No. 144, *supra* note 22.

²⁴ See Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 131 Stat. 2083.

²⁵ Tax Foundation, *Tax Cuts and Jobs Act (TCJA)*, TAX FOUND. (accessed Apr. 30, 2023) <https://taxfoundation.org/tax-basics/tax-cuts-and-jobs-act/>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 131 Stat. 2083.

²⁹ *Id.*

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diminished, when the [C]AMT was generally applied at a [twenty percent] rate and the new flat corporate rate is [twenty-one percent].”³⁰ Though it is likely that the long standing criticism of the CAMT played a part.³¹

c. The Inflation Reduction Act

In 2021 a study discussed how fifty-five of the largest corporations in the United States did not pay income taxes in 2020³² causing President Biden, and other lawmakers, to call for the reinstatement of the CAMT.³³ A proposed CAMT was put into the Inflation Reduction Act. The Inflation Reduction Act is a broad-based legislation which covered combating climate change, lowering health-care costs, raising taxes on “some billion-dollar corporations”—the reintroducing the CAMT—and reducing the federal deficit as part of President Biden’s economic agenda.³⁴ On August 16, 2022, the Inflation Reduction Act was passed into law with a reinstated CAMT.³⁵ This CAMT is described in the next section.

II. CONTOURS OF THE MINIMUM CORPORATE TAX

Section 55 of the IRC imposes both corporate and non-corporate alternative minimum taxes (AMTs).³⁶ Prior to the Inflation Reduction Act, section 55 did not apply to taxpayers that were corporations.³⁷ The Inflation Reduction Act modified the text of section 55 of the IRC—along

³⁰ § 3:83. Disadvantages—Alternative minimum tax, 1 La. Prac. Corp. § 3:83 (2022-2023 ed.)

³¹ See generally Terrence R. Chovrat & Michael S. Knoll, *The Case for Repealing the Corporate Alternative Minimum Tax*, 56 SMU L. REV. 305 (2003).

³² Gardner & Wamhoff, *supra* note 4 at 1.

³³ See White House, *The Biden-Harris Economic Blueprint*, WHITE HOUSE 55 n.149 (Sept. 2022); see also Staff, *Tax Dodgers: How Billionaire Corporations Avoid Paying Taxes and How to Fix It*, Office of Senator Elizabeth Warren 1 n.2 (Nov. 2021).

³⁴ Tony Romm, *Senate approves Inflation Reduction Act, clinching long-delayed health and climate bill*, WASHINGTON POST (Aug. 7, 2022) <https://www.washingtonpost.com/us-policy/2022/08/07/senate-inflation-reduction-act-climate/>.

³⁵ Inflation Reduction Act of 2022, Pub. L. No. 117-169, 135 Stat. 1818.

³⁶ See I.R.C. § 55.

³⁷ See I.R.C. § 55 (2019) (applying to taxpayers other than corporations).

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with sections 11, 12, 38, 53, 59, 860 897, 882, 6425, 6655—to reintroduce a CAMT.³⁸ The Inflation Reduction Act also added a new section 56A to the IRC to define the adjusted financial statement used in conjunction with the new CAMT.³⁹ This section will look at the CAMT Congress created through the Inflation Reduction Act, how the CAMT is set up to work, what corporations the CAMT applies to, when the CAMT goes into effect, how the new CAMT differs from the previous versions of the CAMT, and why the CAMT was reinstated.

a. What is the Corporate Alternative Minimum Tax

Put simply, an AMT is a tax imposed in addition to regular taxes taxpayers pay for specified taxpayers.⁴⁰ Existing tax laws allow for some individuals and corporations to significantly reduce their tax liability through deductions, exemptions, and other tax benefits.⁴¹ AMTs are an attempt to make sure that “taxpayers pay at least a minimum amount of tax.”⁴² AMTs only comes into effect if the regular amount of taxes is less than the taxpayers tentative minimum tax for the year.⁴³ If the tentative minimum tax is higher than the taxpayers regular tax, the difference is imposed on the taxpayer.⁴⁴ The CAMT is the AMT that applies to certain corporations.⁴⁵

b. How it Works

The CAMT is the excess of “the tentative minimum tax for the taxable year” minus “the regular tax for the year plus, in the case of an applicable corporation, the tax imposed by section

³⁸ Inflation Reduction Act of 2022, Pub. L. No. 117-169, 135 Stat. 1818.

³⁹ *Id.*

⁴⁰ I.R.C. § 55.

⁴¹ IRS, *Topic No. 556, Alternative Minimum Tax*, IRS (last updated Apr. 6, 2023) <https://www.irs.gov/taxtopics/tc556>.

⁴² *Id.*

⁴³ *See* I.R.C. § 55(a). For some corporations, the tax imposed by Section 59A of the IRC is added to the regular tax.

Id.

⁴⁴ *Id.*

⁴⁵ I.R.C. § 55(b)(2).

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59A.”⁴⁶ Thus, to calculate the AMT, a taxpayer would need to know what the tentative minimum tax is, what their regular tax is, and, if applicable their section 59A tax liability.

i. Tentative Minimum Tax

The tentative minimum tax for the taxable year for corporations is the amount in surplus of “[fifteen] percent of the adjusted financial statement income for the taxable year” minus “the [CAMT] foreign tax credit (FTC) for the taxable year.”⁴⁷

The adjusted financial statement income is “the net income or loss of the taxpayer set forth on the taxpayer’s applicable financial statement for such taxable year” with additional adjustments.⁴⁸ Instead of looking at a corporation’s regular taxable income, the tentative minimum tax looks at the income presented on applicable financial statements. An applicable financial statement is a “financial statement which is certified as being prepared in accordance with generally accepted accounting principles” and are: a 10-K or annual statement to shareholders filed with the Securities and Exchange Commission (SEC); an audited financial statement for credits purposes, reporting purposes, or other substantial nontax purposes; or, barring the first two, “filed by the taxpayer with any other Federal agency for purposes other than Federal tax purposes.”⁴⁹ If none of these financial statements are available, a financial statement filed with a foreign equivalent with the same or higher requirements as the SEC is applicable.⁵⁰ If both of those types of financial statements are unavailable, any financial

⁴⁶ I.R.C. § 55(a). The AMT only applies if there is an excess found under section 55. *Id.* In other words, it cannot be used to reduce the taxpayers tax liability if the tentative minimum tax is smaller than the regular tax plus the section 59A tax. The only result of such a case would be that no AMT is paid by the taxpayer.

⁴⁷ I.R.C. 55(b)(2)(A). Section 55 provides a different tentative minimum tax for noncorporate taxpayers. *See* I.R.C. 55(b)(1).

⁴⁸ I.R.C. § 56A(a).

⁴⁹ I.R.C. 451(b)(3)(A).

⁵⁰ I.R.C. 451(b)(3)(B).

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statement filed with any other regulatory or governmental agency is applicable.⁵¹ Financial statement income can be negative if a corporation “realizes a loss.”⁵²

Financial statement income is used to determine the “profitability of a company.”⁵³ It is designed to provide a look into the financials of a corporation and includes the income, “costs including depreciation of assets,” and provides a profit or loss on an after-tax basis.⁵⁴ Financial statements are produced by determining what “[i]ncome and deductions are in accordance with Generally Accepted Accounting Principles (GAAP) as set by the Financial Accounting Standards Board [(FASB)], and financial disclosures for public companies are filed with the [SEC], including an annual 10-K report.”⁵⁵ GAAP is a “set of accounting rules, standards, and procedures” that United States corporations must use in the creation of financial statements.⁵⁶ The FASB is an “independent, private- sector, not-for-profit organization . . . that establishes financial accounting and reporting standards for public and private companies and not-for-profit organizations that follow [GAAP].”⁵⁷ The financial statement income can be “useful for assessing the financial health of a business but often does not reflect economic reality and can result in a firm appearing profitable” even while the corporations regular income tax is relatively low or non-existent.⁵⁸

Further adjustments are made to the financial statement income to calculate the tentative minimum tax. These adjustments include several methods of making the financial statements

⁵¹ I.R.C. 451(b)(3)(C).

⁵² Jane G. Gravelle, *The 15% Corporate Alternative Minimum Tax*, CONG. RSCH. SERV., 2 (Jan. 19, 2023).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Jason Fernando, *GAAP: Understanding It and the 10 Key Principles*, INVESTOPEDIA (updated June 28, 2022) <https://www.investopedia.com/terms/g/gaap.asp>.

⁵⁷ FASB, *About The FASB*, FASB 1 (Apr. 2023)

[https://www.fasb.org/document/blob?fileName=About_the_FASB_\(4-23\).pdf](https://www.fasb.org/document/blob?fileName=About_the_FASB_(4-23).pdf).

⁵⁸ Tax Foundation, *Book Income*, TAX FOUND. (accessed Apr. 10, 2023) <https://taxfoundation.org/tax-basics/book-income-vs-tax-income/>.

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closer to the regular tax. One adjustment modifies the financial statement if it “covers a period other than the taxable year.”⁵⁹ Another adjustment adds back in federal tax and FTC excluded from the financial statement income.⁶⁰ There are also several adjustments for specific types of corporations.⁶¹ Section 56A also allows adjustments for depreciation.⁶² It provides for depreciation of assets as allowed by section 167 for property described under section 168.⁶³ This depreciation is offset by the depreciation already accounted for in the financial statements.⁶⁴

After applying the section 56A(c) adjustments, the financial statement income is further modified for financial statement net operating losses.⁶⁵ Financial statement net operating loss is any net loss provided on the financial statement starting in 2020.⁶⁶ This loss can be carried forward to reduce the financial statement income for the next year with a net gain.⁶⁷ But, the net gain on the financial statement can only be reduced by, at most, eighty percent.⁶⁸ Any remaining carried over loss would continue to be carried on to the next year.⁶⁹ All of the adjustments made to the financial statement income create the adjusted financial statement income.⁷⁰

While the FTC is added back into the adjusted financial statement income in section 56A(c)(5), an adjusted minimum tax foreign tax credit (AMTFTC) is removed before determining the tentative minimum tax. The AMTFTC allows a corporation to take into account

⁵⁹ I.R.C. § 56A(c)(1).

⁶⁰ I.R.C. § 56A(c)(5).

⁶¹ See I.R.C. § 56A(c)(14) (providing adjustments for qualified wireless spectrums); I.R.C. § 56A(c)(12) (providing adjustments for tax-exempt organizations); and I.R.C. § 56A(c)(8) (providing adjustments for Alaska Native Corporations).

⁶² I.R.C. § 56A(c)(13).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ I.R.C. § 56A(d).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ I.R.C. § 56A(a).

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their foreign income tax if they choose to take part of the FTC.⁷¹ The AMTFTC is the sum of two factors.⁷² First, a corporations income tax from foreign sources as long as the income is taken into account on the corporation's financial statements and is paid or accrued by the corporation.⁷³ Second, the lesser of: the corporations pro rata share of foreign income tax for the adjusted financial statement income, as provided in section 56A(3), as long as the income is taken into account on the corporation's financial statements and is paid or accrued by the corporation; or the pro rata share as provided in section 56A(3) multiplied by fifteen percent.⁷⁴

Thus, multiplying the adjusted minimum tax income by fifteen percent and subtracting the AMTFTC determines the tentative minimum tax for the taxable year.⁷⁵ The next step in determining the AMT is determining the regular tax a corporation owes and the section 59A tax.⁷⁶

ii. *Regular Tax and Section 59A Tax*

Two types of taxes imposed by the IRC that a corporation may be already paying are removed from the tentative minimum tax to produce the AMT. The taxes are the regular tax paid subsequent to section 11 and the base erosion and anti-abuse tax (BEAT) imposed by section 59A.

A corporation's regular tax is the tax they would pay on their taxable income for a tax year without the AMT. A Corporation's taxable income is calculated by finding its receipts, or revenue, for the taxable year and subtracting any allowable deductions.⁷⁷ Common deductions

⁷¹ See I.R.C. § 59(l). The FTC is "subpart A of Part III of Subchapter N" of the IRC.

⁷² *Id.*

⁷³ I.R.C. § 59(l)(B). Income from foreign sources is as provided in section 901 of the IRC, provided the taxes are imposed by another country or possession of the United States.

⁷⁴ I.R.C. § 59(l)(A).

⁷⁵ I.R.C. § 55(2)(A).

⁷⁶ I.R.C. § 55(a).

⁷⁷ Gravelle, *supra* note 52 at 1.

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include operating expenses, employee expenses, insurance, travel, bad debts, interest, equipment, taxes, professional services, advertising.⁷⁸ A twenty-one percent rate is imposed on the taxable income that results.⁷⁹ Unlike the financial income used to calculate the tentative minimum tax, the regular tax cannot be negative.⁸⁰ But, any loss in a current tax year can be carried forward to future tax years to reduce any positive tax liability.⁸¹

In addition to subtracting the regular tax rate, the tax imposed under section 59A is also subtracted to determine the AMT. Section 59A imposes the BEAT on “taxpayers with substantial gross receipts.”⁸² The BEAT was enacted by the TCJA.⁸³ The BEAT was created to require “some U.S. corporations to pay a minimum tax associated with deductible payments to non-U.S. related parties.”⁸⁴ For the purposes of this paper we only need to know that it exists and if it is applicable to a corporation, it is also removed from the AMT.

Thus, certain corporations are required to calculate two sets of income to find their tax in two separate ways to determine their total tax liability for the year.

c. Applicable Corporations

The AMT does not apply to every business entity or every corporation. This makes sense for pass through entities, since an AMT already applies to individual, noncorporate, taxpayers.⁸⁵

⁷⁸ Sherrie Scott, *Top 10 Corporate Tax Deductions*, CHRON (Last Accessed Apr. 10, 2021) <https://smallbusiness.chron.com/top-10-corporate-tax-deductions-10403.html>.

⁷⁹ I.R.C. § 11(b).

⁸⁰ Gravelle, *supra* note 52 at 1.

⁸¹ *Id.* at 3 (the offsets are limited to eighty percent of taxable income per year).

⁸² I.R.C. § 59A (taxpayers with gross receipts are most C corporations with annual gross receipts of half a billion dollars and a base erosion rate greater than three percent).

⁸³ Julie Goosman et al, *Insurance Tax Developments in 2019: Adapting to TCJA Guidance*, TAX NOTES FED. 1555 (June 1, 2020) <https://www.taxnotes.com/tax-notes-today-federal/insurance/insurance-tax-developments-2019-adapting-tcja-guidance/2020/06/17/2ck90>.

⁸⁴ *Id.*

⁸⁵ I.R.C. § 55.

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But what corporations does the CAMT apply to? The short answer is applicable corporations since the AMT only applies to them.⁸⁶

Simply put applicable corporation are certain billion-dollar C corporations. Expanding on that answer, applicable corporations are any corporation that meet the average annual adjusted financial statement income (AFSI) test for “one or more taxable years” prior to the current taxable year.⁸⁷ But, the average annual AFSI income test for prior years does not start until after December 31, 2021.⁸⁸ Thus, 2023 is the first year where an applicable corporation can exist.⁸⁹ Effectively the CAMT is not applicable until the 2023 tax year.

Once a corporation becomes an applicable corporation, it is most likely permanent, even if the corporation no longer meets the average annual AFSI test.⁹⁰ The Secretary of Treasury does have the discretion to make a corporation a non-applicable corporation if it has a “change of ownership” or does not meet the average annual AFSI test for several years.”⁹¹

The average annual AFSI test is satisfied if a corporation’s average annual AFSI exceeds one billion dollars over a three-year period.⁹² Rather, if a corporation makes, on average, a billion dollars or more a year, as stated on their AFSI, for any three-year period, the corporation

⁸⁶ I.R.C. § 55(b)(2). Non-applicable corporations have a tentative minimum tax of zero, *see* I.R.C. § 55(b)(2)(B), effectively making their AMT for these corporations zero, since there would never be an excess in computing the AMT. *See* I.R.C. § 55(a).

⁸⁷ I.R.C. 59(k)(1)(A). S corporations, regulated investment companies, or real estate investment trusts are excluded from applicable corporations even if they meet the annual adjusted financial statement income test. *Id.*

⁸⁸ *See* I.R.C. 59(k)(1)(A)(ii).

⁸⁹ *See also* I.R.S. Notice 2023-7, 2022-229.

⁹⁰ Since the statute only says that the corporation is applicable if it meets the AFSI for one or more taxable years, with no indication when it is required. *See* I.R.C. 59(k)(1)(A); *see also* PWC, *Corporate Book Minimum Tax to be Effective for 2023*, PWC (Aug. 2022) (stating that “[o]nce a taxpayer is an applicable corporation, it remains an applicable corporation for all tax years in the future (unless Treasury provides an exemption).”) <https://www.pwc.com/us/en/services/tax/library/corporate-book-minimum-tax-to-be-effective-for-2023.html>.

⁹¹ I.R.C. 59(k)(1)(C) (only if the Secretary “determines it would not be appropriate to treat such corporation as an applicable corporation).

⁹² I.R.C. 59(k)(1)(B)(i). A different annual average AFSI—one hundred million—applies for “foreign-parented multinational groups.” I.R.C. 59(k)(B)(ii). For a more detailed discussion of AFSI see section II(b).

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becomes an applicable corporation. Initially a corporation would have to have an annual average AFSI of a billion dollars for 2020, 2021, and 2022 to become an applicable corporation.⁹³

d. How it Differs from Previous Versions

While the current version of the CAMT was passed for similar reasons and to meet similar ends as the previous version,⁹⁴ the two versions of the CAMT have several major differences. These differences seem to boil down to which corporations the CAMT applies to and how a corporation can become such a corporation, the type of income used for the calculating how the tentative minimum tax, and the kinds of adjustments allowed. Additional differences, such as the percentage of taxable income the tentative minimum tax requires,⁹⁵ or the addition of the tax imposed by section 59A,⁹⁶ exist.

As noted above, the current version of the CAMT applies only to applicable corporations.⁹⁷ In contrast the pre-2017 version applied to all corporations not exempted as a small corporation or if the corporation's AMT was less than the exemption amount.⁹⁸ The exemption was much smaller for the previous version, as a corporation would have to have an average annual gross receipts of less than seven and a half million dollars over a three-year period.⁹⁹ Further, unlike the current version of the CAMT, where the corporation can only

⁹³ See I.R.C. 59(k).

⁹⁴ See *infra* Part II.c.; see also *supra* Part I.a. Specifically, both want to try to address perceived abuses of existing tax benefits by the CAMT's imposition while increasing the tax base.

⁹⁵ The 2017 version of section 55, the previous version of the IRC with the corporate minimum tax, applied a twenty percent rate to the taxable income. I.R.C. § 55(b)(1)(B) (Effective: Dec. 18, 2015, to Dec. 21, 2017). The Current version of section 55 applies a fifteen percent to the taxable income. I.R.C. § 55(b)(2). The lower rate is possibly due to the generally lower tax rate for corporation which currently is twenty-one percent, I.R.C. § 11, as opposed to the corporate tax rate before 2017, which had several tax brackets with the highest rate of thirty-five percent for taxable income over ten million dollars. I.R.C. § 11 (Effective: [See Text Amendments] to Dec. 21, 2017).

⁹⁶ Section 59A was implemented under the TCJA so could not be considered in the pre-2017 calculation of the CAMT.

⁹⁷ See *supra* Part II.c.

⁹⁸ See I.R.C. § 55 (Effective: Dec. 18, 2015, to Dec. 21, 2017).

⁹⁹ See I.R.C. § 55(e) (Effective: Dec. 18, 2015, to Dec. 21, 2017). Gross receipts test would be lowered to an annual average gross receipt of five million dollars if it was the corporation's first three-year period. *Id.*

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become ineligible if the company changes ownership, or if the Secretary of Treasury allows,¹⁰⁰ the previous version only had a three year requirement to become eligible for the exemption.¹⁰¹ Further, the previous version of the CAMT allows for an exemption if the corporations alternative minimum taxable income is less than the exemption amount.¹⁰²

Although the previous version of the CAMT started as a minimum tax based on the book value, that designation did not last long.¹⁰³ The previous version of the AMT eventually was based on the taxable income for the corporation's tax year with adjustments and tax preferences.¹⁰⁴ The new version of the AMT is based on the applicable financial statements, or rather the book value of the corporation.¹⁰⁵ Book value is calculated with a different purpose than the taxable income. Book income is what corporations use when periodically reporting their financials to their shareholders and the SEC, while tax income is what corporations use to determine their tax liability to the IRS.¹⁰⁶ These values are determined by different methods. As noted above the book income is determined by GAAP accounting procedures promulgated by the FASB for securities reporting requirements.¹⁰⁷ The taxable income is based on United States tax rules as set out by the IRS from legislation passed by Congress. Because the two sets of income differ in their calculation methods, the values can diverge.¹⁰⁸ Many of these divergences are the

¹⁰⁰ I.R.C. § 59(k)(1)(A)(ii).

¹⁰¹ Contrasted to the current version with its perpetual status as an applicable corporation once a corporation becomes eligible. *See* I.R.C. § 55(e) (Effective: Dec. 18, 2015 to Dec. 21, 2017).

¹⁰² *See* I.R.C. § 55(b)(1)(B) (Effective: Dec. 18, 2015 to Dec. 21, 2017) (the exemption amount was last set at forty thousand dollars).

¹⁰³ *See* Cummings, *supra* note 18.

¹⁰⁴ *See* I.R.C. § 55(b)(2) (Effective: Dec. 18, 2015 to Dec. 21, 2017).

¹⁰⁵ *Supra* Part II.b.

¹⁰⁶ Tax Foundation, *supra* note 58.

¹⁰⁷ Fernando, *supra* note 56.

¹⁰⁸ Tax Foundation, *supra* note 58. The values seem to be diverging by a greater amount since the 1990's, possibly because of changes in executive compensation. *See generally* Mihir A. Desai, *The Divergence Between Book Income and Tax Income*, 17 TAX POL'Y & ECON. 169 (2003).

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result of timing such as the timing of depreciation and the carry-over of net operating loss.¹⁰⁹

The book value is also usually for a different period of time than the tax year.

The new CAMT has implemented several methods of reconciling these differences in the book value to calculate the tax liability due for the CAMT.¹¹⁰ But, the book income also differs from the tax income in the reporting of its costs of investments, since tax income allows them to be deducted.¹¹¹ Further, treatment of certain compensation methods are treated different between the accounting methods.

These differences are largely because the accounting methods have different ends. The book income is to inform shareholders and the public about the health of a corporation and how it is being managed.¹¹² Thus, they are targeted to the SEC, shareholders, and investors to show the strengths, or weakness of a company. In contrast, the tax income is used for different purposes including: 1) its primary purpose of collecting revenues for the government; and 2) its secondary purpose of promoting certain policies through tax expenditures.¹¹³ Finally, while the book income does consider taxes, the new CAMT removes them while using the book value.¹¹⁴ Thus, many tax credits considered in the taxable income are not considered in the book value unless specified.

¹⁰⁹ Tax Foundation, *supra* note 58.

¹¹⁰ *Supra* Section II.b.i.

¹¹¹ Tax Foundation, *supra* note 58.

¹¹² SEC, *Beginnners' Guide to Financial Statements*, SEC (Jan. 12. 2014) (the “nutrition label” of the company) [https://www.sec.gov/oiea/reports-and-publications/investor-publications/beginners-guide-financial-statements#:~:text=There%20are%20four%20main%20financial,\)%20statements%20of%20shareholders%20equity](https://www.sec.gov/oiea/reports-and-publications/investor-publications/beginners-guide-financial-statements#:~:text=There%20are%20four%20main%20financial,)%20statements%20of%20shareholders%20equity).

¹¹³ See Joseph J. Minarik, *Taxation*, ECONLIB (accessed Apr. 30, 2023) <https://www.econlib.org/library/Enc/Taxation.html#:~:text=Economists%20specializing%20in%20public%20financ,e,the%20appropriate%20balance%20among%20them>.

¹¹⁴ I.R.C. § 56A(c)(5).

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III. WHY THE CORPORATE ALTERNATIVE MINIMUM TAX WAS PROPOSED

There seem to be two major factors for passing the CAMT: first, the CAMT would allow the government to collect taxes from large corporations that “don’t pay enough in taxes;” and second, the CAMT would allow for the collection of more taxes by effectively expanding the tax base.¹¹⁵

a. Corporations Paying their Fair Share

In 2021, President Biden wanted to “ensure[] that large corporations [were] paying their fair share.”¹¹⁶ According to a 2021 study by Matthew Gardner and Steve Wamhoff of the Institute on Taxation and Economic Policy (ITEP), “[a]t least [fifty-five] of the largest corporations in America paid no federal corporate income taxes” in 2020 “despite enjoying substantial pretax profits in the United States.”¹¹⁷ The study posed companies were able to avoid paying tax because of the TCJA. The fifty-five companies reported around \$40.5 billion in pretax income on their financial reports and could have paid upwards of \$8.5 billion in tax.¹¹⁸ Instead the companies received \$3.5 billion dollars in tax rebates.¹¹⁹ Further, “[t]hirty-nine profitable corporations in the S&P 500 or Fortune 500 paid no federal income tax from 2018 through 2020, the first three years that the Tax Cuts and Jobs Act (TCJA) was in effect.”¹²⁰

¹¹⁵ See Cummings, *supra* note 18. The CAMT has the added benefit of increasing the tax base without being categorized as a tax increase. Laura Davison, *How the 15% US Minimum Corporate Tax Would Work: QuickTake*, BLOOMBERG TAX (Aug. 1, 2022, 4:02 PM) https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report/X77EVM60000000?bna_news_filter=daily-tax-report#jcite.

¹¹⁶ White House, *Fact Sheet: The American Jobs Plan*, WHITE HOUSE (Mar. 31, 2021)

<https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>.

¹¹⁷ Gardner & Wamhoff, *supra* note 4 at 1.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Matthew Gardner & Steve Wamhoff, *Corporate Tax Avoidance Under the Tax Cuts and Jobs Act*, ITEP 1 (Apr. 2021) (while some of the corporations paid income taxes in one year, their net balance over the period was zero after tax credits).

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What is interesting is that these findings are not based on what these corporations actually paid but what they reported in their financial statements.¹²¹ In addition, Gardner and Wahmhoff seem to be looking at the current domestic provisions for federal income tax on the financial statements without considering the deferred provisions for federal income tax.¹²² “The deferred income tax is a liability that the company has on its balance sheet but that is not due for payment yet.”¹²³ Thus, the fact that these corporations paid zero dollars in tax is based entirely on estimates generated for their book value, not on their actual taxable income.

However, there is a perceived inequity between corporations earning “billions” of dollars in revenue while seemingly being able to pay zero dollars in income tax. This perceived inequity has been a motivating factor for not only the most recent version of the CAMT, but also the 1986 version and the original AMT. Gardner and Wahmhoff claim that US corporations have been finding ways to shield “their profits from federal income taxation” since at least the tax cuts that occurred under the Regan administration.¹²⁴ A majority of Americans also feel that some corporations do not pay enough in taxes.¹²⁵ This feeling is especially prevalent in Democratic voters.¹²⁶ The amount of income taxes corporations pay, or rather the lack thereof, is often cited

¹²¹ Gardner & Steve, *supra* note 4 at 1.

¹²² For example, Gardner & Wamhoff claim that FedEx was paying no federal income tax in 2020 and received \$230 million in tax rebate. *Id.* at 3. But FedEx’s annual report estimated FedEx to have \$67 million in current state and local income tax, \$198 million in current foreign income tax, and had deferred federal income tax of \$475 million with an additional million dollars in deferred state and local income tax effectively and a rebate of \$128 million in deferred foreign income tax for a total income tax of \$383 million creating an effective tax rate of twenty-three percent. FedEx Co., Annual Report (Form 10-K) (Jul. 7, 2020).

https://www.sec.gov/ix?doc=/Archives/edgar/data/0001048911/000156459020032775/fdx-10k_20200531.htm
¹²³ Tax & Accounting, *What is a provision for income tax and how do you calculate it?*, THOMSON REUTERS (Feb 1, 2023) <https://tax.thomsonreuters.com/blog/tax-provision-how-to-calculate-it/#:~:text=The%20deferred%20income%20tax%20is,tax%20rate%20to%20that%20total.>

¹²⁴ *Id.*

¹²⁵ J. Baxter Oliphant, *Top Tax Frustrations for Americans: The Feeling That Some Corporations, Wealthy People Don’t Pay Fair Share*, Pew Research (Apr. 7, 2023) (with sixty-one percent of adults saying that it bothers them a lot and another twenty-two percent of adults saying it bothers them some) <https://www.pewresearch.org/short-reads/2023/04/07/top-tax-frustrations-for-americans-the-feeling-that-some-corporations-wealthy-people-dont-pay-fair-share/>.

¹²⁶ *Id.* Seventy-seven percent of democrats and democratic leaning voters are bothered a lot by the taxes corporations pay as opposed to forty-six percent of republicans and republican leaning voters, a not insignificant amount.

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by politicians as ways to fund social services and other federal and state needs.¹²⁷ Thus, there exists a political drive to do something about the taxes these corporations pay, or rather are perceived to not pay. The CAMT was President Biden’s proposal to make sure that “large, profitable corporations cannot exploit loopholes in the tax code to get by without paying U.S. corporate taxes.”¹²⁸ Something does have to be done to correct the perception that corporations are not paying their fair share in taxes, as the perception that corporations do not pay their fair share, especially the largest corporations, could undermine the tax system.¹²⁹ But is the CAMT the best measure to do so?

b. Raise Corporate Tax Rate

The other major reason for the CAMT, seemingly flowing from corporations not paying their fair share of taxes, is broadening the corporate tax base. The CAMT is seen as a “major revenue raiser in the Inflation Reduction Act.”¹³⁰ The Joint Committee on Taxation (JCT) projects the CAMT to generate \$222.2 billion in additional revenue projected over a nine-year period.¹³¹ Over the same period, the Congressional Budget Office has projected that corporate income taxes will generate over four and a half trillion dollars in tax revenues.¹³² The additional

¹²⁷ See Lizzie Seils, Corporations aren’t paying fair share in taxes according to an Economic Policy Institute report, WGEM (Apr. 14, 2022); see also Patty Murray, On Tax Day, Senator Murray Highlights the Cost of Tax Dodging by Billionaires and Giant Corporations at Budget Hearing, U.S. Senator Patty Murray (Apr. 18, 2023) (saying that trillions of dollars of lost tax revenue from corporations could be used to rebuild “America’s broken child care system”) <https://www.murray.senate.gov/on-tax-day-senator-murray-highlights-the-cost-of-tax-dodging-by-billionaires-and-giant-corporations-at-budget-hearing/>.

¹²⁸ White House, *supra* note 116.

¹²⁹ Especially when over half Americans believe they are paying more than their fair share in taxes. Oliphant, *supra* note 125.

¹³⁰ Gravelle, *supra* note 52 at 5.

¹³¹ JCT, *Estimated Budget Effects of the Revenue Provisions Off Title I – Committee on Finance, of an Amendment in the Nature of a Substitute to H.R. 5376, “an Act to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14,” as Passed by the Senate on August 7, 2022, and Scheduled for Consideration by the House Of Representatives on August 1* (Aug. 9, 2022) (the report shows ten years, FY2022 to FY2031 but the first year does not generate any income, so the projection is really over a nine year period) <https://www.jct.gov/publications/2022/jcx-18-22/>.

¹³² See Congressional Budget Office, *The Budget and Economic Outlook: 2022 to 2032*, CONG. BUDGET OFFICE 7 (May, 2022) (the total estimated corporate income tax from 2023 to 2031 is \$4.633 trillion dollars out of \$49.837 trillion dollars in total tax revenue) <https://www.cbo.gov/system/files/2022-05/57950-Outlook.pdf>.

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\$222.2 billion dollars generated by the CAMT would increase the revenue generated by corporate income tax by around five percent.¹³³ The CAMT would generate the same amount of income as increasing the corporate income tax rate by a little more than one percent, *ceteris paribus*.¹³⁴ The Congressional Budget Office has proposed increasing the corporate tax rate by one percent as a method of reducing the United States' mounting deficit for the past few years.¹³⁵

Thus, the CAMT would allow Congress to indirectly increase the corporate tax rate by at least one percent, possibly more, possibly less, without increasing the actual corporate tax rate. This has the benefit of allowing Congress to increase the corporate tax base by collecting more corporate income tax while technically not raising any taxes.¹³⁶ In addition, Congress can get the same results, assuming the projections are accurate, while taxing less of the corporate tax base, since only corporations making more than a billion dollars would be taxed.¹³⁷ The vast majority of C-corporations would not be affected by the CAMT, where every corporation would be affected by raising the corporate tax rate.¹³⁸ All of this assumes however, that the CAMT will

¹³³ The calculations done by the Congressional Budget Office indicate a 5.8 percent increase in corporate tax revenue, but Gravelle's calculations seem to include the corporate income for 2022 and seem to be based on July 2021 forecast. Gravelle, *supra* note 52 at 5; see also Congressional Budget Office, *An Update to the Budget and Economic Outlook: 2021 to 2031*, CONG. BUDGET OFFICE 2 (July, 2021) <https://www.cbo.gov/system/files/2021-07/57218-Outlook.pdf>. "As a result of upward revisions to the forecast of nominal GDP, revenues . . . corporate taxes [were] projected to be higher than CBO projected in July 2021." Congressional Budget Office, *supra* note 132 at 116.

¹³⁴ Gravelle's estimated that it had the same effect as raising the corporate tax rate by around two percent. Gravelle, *supra* note 52 at 6.

¹³⁵ See Congressional Budget Office, *Options for Reducing the Deficit, 2023 to 2032 Volume II: Smaller Reductions*, CONG. BUDGET OFFICE 58 (Dec. 2022) <https://www.cbo.gov/system/files/2022-12/58163-budget-options-small-effects.pdf>; see also Congressional Budget Office, *Options for Reducing the Deficit: 2021 to 2030*, CONG. BUDGET OFFICE 77 (Dec. 2020) <https://www.cbo.gov/system/files/2020-12/56783-budget-options.pdf>.

¹³⁶ See Davison, *supra* note 115. Though it is not certain how controversial raising corporate tax would be considering that most democratic and democratic leaning voters and a little less than half of republican and republican leaning voters think that corporations are not being taxed enough. Oliphant, *supra* note 125.

¹³⁷ *Supra* Part II.b.

¹³⁸ The census recorded over two million c-corporations and other corporate legal forms of organization not including s-corporations in 2021. Economic Surveys, *All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021*, US CENSUS BUREAU (April 27, 2023) <https://data.census.gov/table?q=CBP2021.CB2100CBP&tid=CBP2021.CB2100CBP>.

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capture as much tax revenue as planned and the expected CAMT tax revenue has already been adjusted downwards at least twice.¹³⁹

Yet, if the true goal of the CAMT is to raise taxes, it is much narrower than it could be. Corporations with no effective federal income taxes is not a problem reserved for the largest corporations. Between 2014 and 2018 about sixty-eight percent of all corporations, approximately fifty thousand a year, did not pay any federal income tax.¹⁴⁰ The government is leaving possibly millions or billions of dollars of extra income on the table by leaving out the vast majority of corporations. Further, the cut off amount of one-billion dollars seems to be arbitrary. There does not seem to be much of a distinction between a company that makes one billion dollars versus 999 million dollars, a relatively small difference. This gap could possibly disincentivize generating income at the margins, and likely increasing gamesmanship once the new rule has been incorporated into a corporation's tax planning. Even excluding a blanket CAMT, some form of phase-in income would be able to generate additional income. Further, even if the CAMT does not directly affect smaller companies, it will increase their cost of doing business, as they need to learn how the CAMT affects them,¹⁴¹ without raising revenues for the government. It seems that the CAMT, rather than being a policy designed specifically to tax, is a policy to punish certain companies deemed to be too large not to pay taxes.

c. Additional Benefits

While not being main factors, several additional benefits are argued for the CAMT. We will examine three—that it: stops corporations from using loopholes to avoid taxes; that it will

¹³⁹ Gravelle, *supra* note 52 at 5-6. The original projections where \$313 billion over the same period but was reduced to \$258 billion after tax recovery was allowed for “depreciation and wireless spectrum rights. *Id.* Another \$35 billion was shaved off for “exemptions for portfolio companies.” *Id.* at 6.

¹⁴⁰ GOA, *supra* note 139 at 12.

¹⁴¹ Bill Henson, *Inflation Reduction Act Burdens Small and Midsize Businesses: Opinion*, CFO (Sept. 14, 2022) (especially those companies with significant overseas presence).

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improve the tax code in general; and that it will improve financial transparency of corporations.

But upon further examination, these arguments do not seem to be convincing.

i. Avoid Tax Loopholes

As noted above, Gardner and Wamhoff argue that fifty-five extremely large corporations were able to avoid federal corporate income taxes in 2020 alone.¹⁴² These companies had an annual pretax revenue of more than forty billion as reported on their annual financial reports.¹⁴³ Gardner and Wamhoff's report was cited widely by the Biden administration and other politicians as a clear example of "billion dollar" corporations not paying their "fair share."¹⁴⁴ How were these corporations able to "avoid" paying taxes? The reasoning is that these corporations took advantage of tax loopholes.¹⁴⁵ Gardner and Wamhoff cite several "familiar tax breaks" that corporations are using to reduce their tax burden to zero.¹⁴⁶ They cite: tax breaks for executive stock options and renewable energy; tax credits for research and experimentation (R&E); and accelerated depreciation as ways companies were able to reduce their tax burden to zero.¹⁴⁷ Tax loopholes and taking advantage of current tax credits seems to be a common complaint against corporations.¹⁴⁸

Yet, corporations are not breaking any laws when they are taking advantage of these tax breaks. In fact, it almost seems like a misnomer to consider these breaks as loopholes. A loophole is defined by Black's Law Dictionary as an ambiguity, omission, or exception "that

¹⁴² Gardner & Wamhoff, *supra* note 4 at 1.

¹⁴³ *Id.*

¹⁴⁴ See White House, *supra* note 33 at 55 n.149; see also Staff, *supra* note 33 at 1 n.2 (Nov. 2021).

¹⁴⁵ Gardner & Wamhoff, *supra* note 4 at 1.

¹⁴⁶ *Id.* at 4.

¹⁴⁷ *Id.*

¹⁴⁸ See Amy Hanauer, *Corporate Tax Reform in the Wake of the Pandemic*, ITEP 12 (April 2021); see also Staff, *supra* 33 at 1 (stating the CAMT would be used for billion-dollar corporations that "use loopholes and accounting gimmicks to pay little to nothing in taxes, like getting a tax break for exorbitant executive compensation").

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provides a way to avoid a rule without violating its literal requirements.”¹⁴⁹ A tax loophole is cordoned off as a “tax-code provision that allows a taxpayer to legally avoid or reduce income taxes.”¹⁵⁰ As such, any legal reduction in income, validated by Congress, becomes a “loophole.”

The negative connotations of loopholes imply a deceptive nature behind a business’s conduct.¹⁵¹ But Congress often has reasons for creating these reductions. A backdoor method of getting spending passed is through an addition of a provision in the tax code providing an additional deduction or credit for the desired activity.¹⁵² These are often referred to as tax expenditures.¹⁵³ While it is debatable that all tax expenditures, especially corporate tax expenditures, actually achieve their goals,¹⁵⁴ plenty of spending programs have been seen as wasteful and ineffective.¹⁵⁵ It therefore seems that “loophole” is a buzzword often used to characterize tax policies which someone opposes.¹⁵⁶ Thus, instead of addressing these disagreements over tax policy directly, the CAMT allows for policymakers to avoid the question of which policies are actual tax loopholes and how they should be fixed, while claiming they are holding those abusing the tax policy accountable. Yet the CAMT has been proposed as the only workable solution to address these “loopholes.”¹⁵⁷

¹⁴⁹ *Loophole*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁵⁰ *Id.*

¹⁵¹ Opportunity Washington, *You Say “Loophole,” I Say “Potahto”: Understanding the Way We Talk About Tax Policy and Finding Ways to Clarify the Conversation*, OPPORTUNITY WASH. (Wed., May 10, 2017) (most references to “loopholes” are pejorative and intend to express criticism). It would be interesting to see what taxpayers in college would think if they were accused of using a loophole when claiming their American Opportunity Credit.

¹⁵² See Frank Sammartino & Eric Toder, *Tax Expenditure Basics*, TAX POL’Y CTR. 2 (Jan. 22, 2020) https://www.taxpolicycenter.org/sites/default/files/publication/158324/tax_expenditure_basics.pdf.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See generally White House, *March 09, 2023, Fact Sheet: The President’s Budget Cuts Wasteful Spending on Big Pharma, Big Oil, and Other Special Interests, Cracks Down on Systemic Fraud, and Makes Programs More Cost Effective*, WHITE HOUSE (Mar. 9, 2023).

¹⁵⁶ Opportunity Washington, *supra* note 151.

¹⁵⁷ See Reuven S. Avi-Yonah, *The Case for Reviving the Corporate AMT*, TAX NOTES (Nov. 8, 2021) <https://www.taxnotes.com/featured-analysis/case-reviving-corporate-amt/2021/11/05/7ck9x>.

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ii. Improve the Tax Code

Another benefit is that the CAMT would improve the tax code by bringing fairness for those corporations which do not pay enough corporate tax.¹⁵⁸ But it seems that “[n]o one believes it reflects good tax policy.”¹⁵⁹ Supporters have put it forward as a second-best solution to political reality.¹⁶⁰ It seems more like a solution to tax problems caused by some corporations using existing tax policy too much, rather than a viable solution. The solution to tax expenditures is another layer of complexity to an already complex tax system. Thus, a more complex tax code would make the IRC harder to use, and at minimum, will leave the tax code no better off.

iii. Improve Financial Transparency

Another proposed benefit of the CAMT is that it will increase financial transparency.¹⁶¹ Since the financial disclosures follow book income closer than corporate tax, it is posited that CAMT will incentivize management to “not inflate financial income because it results in more AMT being paid.”¹⁶² Thus, financial disclosure would be improved.

Yet this claim seems to be based more on speculation. An increase in financial transparency does not seem to be likely. A study by a former Hill staffer and some well-regarded practitioners and academics looked at the briefly lived 1986 version of the CAMT which focused on the book value and found that some of the “affected corporations did, in fact, manage down their book income.”¹⁶³ Yet there is no indication as to whether this was corporations deflating their value to reflect true statements, or shifting revenue and expenses to

¹⁵⁸ See Staff, *supra* note 33 at 1.

¹⁵⁹ Cummings, *supra* note 18.

¹⁶⁰ See Avi-Yonah, *supra* note 157.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Cummings, *supra* note 18.

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minimize their additional tax. Further, it is unclear if the abetment would be conducted by corporations of similar size to those affected by the new CAMT.¹⁶⁴

Equally plausible claims is that the CAMT will have no effect on financial disclosures as the companies reporting would have too much of a benefit from posting large profits to want to adjust their statements.¹⁶⁵ Also plausible is that corporations will use gamesmanship to shift tax liabilities away from their book value reducing “the information quality of [their] book income.”¹⁶⁶ Thus, it is uncertain if the CAMT will have any effect on financial transparency, or even a positive effect.

Finally, with all of these proposed benefits, there is one immense draw back.

IV. A BIG PROBLEM

The CAMT gives some of Congress’s power—determining what is taxable income—to an unelected organization, for some corporate tax income. A key part of the CAMT is the reliance on corporations’ book value based on regularly released financial statements.¹⁶⁷ As noted, most book values are based on the standards set by the FASB.¹⁶⁸

FASB is “an independent, private-sector, not-for-profit organization based in Norwalk, Connecticut, that establishes financial accounting and reporting standards for public and private companies.”¹⁶⁹ It has seven members who are appointed by trustees for five to ten year terms.¹⁷⁰ FASB is important because the SEC has billed them as the “standard setter for public

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Kyle Pomerleau, *Joe Biden’s Alternative Minimum Book Tax*, 169 TAX NOTES FED. 109, 113 (2020) <https://www.aei.org/wp-content/uploads/2020/11/Pomerleau-On-the-Margin-October-5-2020.pdf?x91208>.

¹⁶⁷ See *supra* Part II.

¹⁶⁸ *Id.*

¹⁶⁹ FASB, *supra* note 56.

¹⁷⁰ *Id.*

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companies.”¹⁷¹ While it may be a problem for an un-elected non-governmental board to set standards, FASB was only setting standards for information companies needed to provide to investors for reporting purposes. Now changes made by FASB can have a direct effect on the taxable income of corporations.¹⁷² Congress could then try to lobby and influence FASB to either broaden or narrow the tax base, accordingly, indirectly affecting the reporting standards to investors.¹⁷³ Even more concerning is the potential for corporations to lobby FASB for favorable financial ratings. “[J]ust because corporate America isn't currently lobbying FASB, that doesn't mean they won't start tomorrow.”¹⁷⁴ And if corporate lobbying does occur, the respect that is held in book income could be destroyed not just for the CAMT but for investor information.

V. AN OLD SOLUTION FOR AN OLD PROBLEM

A CAMT is not a new solution for what is seen as corporations avoiding taxes. Every iteration of the CAMT was based on the presumption that corporations needed to pay more taxes. And the solution was always to impose the CAMT. The CAMT is often cited as the only “practical solution” to the problem of large corporations not paying taxes.¹⁷⁵ But does the CAMT work?

For the past forty years the corporate tax has fluctuated around two percent of gross domestic product.¹⁷⁶ Between 2002 and 2022 corporate income tax revenues fluctuated with a low of

¹⁷¹ *Id.*

¹⁷² See Pomerleau, *supra* note 166 at 114.

¹⁷³ *Id.*

¹⁷⁴ Robert Goulder & Joseph Thorndike, *Breaking Down the Inflation Reduction Act's Corporate Alternative Minimum Tax*, FORBES (Oct 19, 2022) <https://www.forbes.com/sites/taxnotes/2022/10/19/breaking-down-the-inflation-reduction-acts-corporate-alternative-minimum-tax/?sh=5d08e5102395>.

¹⁷⁵ Staff, *supra* note 33 (advocating for the imposition of the CAMT to restore “tax fairness”); *see also* Avi-Yonah, *supra* note 157 (stating the CAMT was the only practical solution due to the political reality).

¹⁷⁶ GOA, *Corporate Income Tax: Effective Rates before and after 2017 Law Change*, GOA 5 (Dec. 2022).

Clifford Perez – Writing Sample I

\$125 billion in 2002 and a high of \$366 billion in 2006.¹⁷⁷ Corporations did not stop paying taxes when the CAMT was repealed. A study conducted by Gardner, Robert McIntyre, and Richard Philips of the ITEP found that between 2008 and 2015, around thirty companies paid effective tax rates of less than ten percent with eighteen paying no federal income tax for that entire period.¹⁷⁸ It is also based on the assumption that the book value is harder to manipulate.¹⁷⁹ But many financial crises have shown this not to be the case.¹⁸⁰

But why do legislatures keep going back to the same well? Because they are trying to have their cake and eat it.¹⁸¹ Legislatures want to address the issue without addressing the underlying causes. Professor of Law, Reuven Avi-Yonah at the University of Michigan argues that it is a second-best measure since political reality makes it near impossible to revise corporate benefits.¹⁸² “Some observers that normally would oppose a minimum tax as bad tax policy have supported the new CAMT as the best political compromise available under current conditions.”¹⁸³ And that is exactly what is being pushed forward—a bad tax policy to combat bad tax policies. Instead of doing the hard work and closing any gaps or “loopholes,” legislatures are painting over the cracks and adding to an even bigger problem, the tax code’s increasing complexity.

¹⁷⁷ St. Louis FED, Federal Government: Tax Receipts on Corporate Income, FRED (Accessed April 30, 2023) <https://fred.stlouisfed.org/series/FCTAX>.

¹⁷⁸ Matthew Gardner, Robert S. McIntyre, & Richard Phillips, *The 35 Percent Corporate Tax Myth Corporate Tax Avoidance by Fortune 500 Companies, 2008 to 2015*, ITEP 3 (March 2017).

¹⁷⁹ Charvat & Knoll, *supra* 31 at 305.

¹⁸⁰ *Id.* (The financial accounting abuses at Enron, WorldCom, Global Crossing and Qwest showed that book income can also be heavily manipulated and therefore is not necessarily a more accurate measure of performance than taxable income).

¹⁸¹ See Cummings, *supra* note 18.

¹⁸² See Avi-Yonah, *supra* note 157.

¹⁸³ Cummings, *supra* note 18.

Clifford Perez – Writing Sample I

The Taxpayer Advocate Service (TAS) stated that the most serious problem facing taxpayers and the IRS is the complexity of the IRC.¹⁸⁴ This complexity:

- [1] Makes compliance difficult, requiring taxpayers to devote excessive time to preparing and filing their returns;
- [2] Requires the significant majority of taxpayers to bear monetary costs to comply, as most taxpayers hire preparers, and many other taxpayers purchase tax preparation software;
- [3] Obscures comprehension, leaving many taxpayers unaware how their taxes are computed and what rate of tax they pay;
- [4] Facilitates tax avoidance by enabling sophisticated taxpayers to reduce their tax liabilities and by providing criminals with opportunities to commit tax fraud;
- [5] Undermines trust in the system by creating an impression that many taxpayers are not compliant, thereby reducing the incentives that honest taxpayers feel to comply; and
- [6] Generates tens of millions of telephone calls to the IRS each year, overburdening the agency and compromising its ability to provide high-quality taxpayer service.¹⁸⁵

When legislatures pass the buck and do not address the burdens that are created by misstructured tax policy, they are putting the burden onto taxpayers—in this case corporations. These corporations are then incentivized to hire creative tax planners to try to reduce their tax liability.¹⁸⁶ The complex nature of the double taxation created by the CAMT further obfuscates the actual tax liability of corporations. Corporations are further removed from their tax liability, and some are still likely to show no tax revenues on their financial statements. It also adds another avenue for corporate taxpayers to try to avoid the new tax, as all billion-dollar companies are likely to be sophisticated taxpayers. Not addressing the issues will further erode the trust in the tax system and may possibly make it worse if taxpayers still see corporations avoiding taxes even after its

¹⁸⁴ Taxpayer Advocate Service, *The Complexity of the Tax Code, 2012 Annual Report to Congress — Volume One* [hereinafter “Complexity”] pg 3 <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Most-Serious-Problems-Tax-Code-Complexity.pdf>. TAS is an “independent organization within the IRS” which “ensures that every taxpayer is treated fairly” and understands their rights. Taxpayer Advocate Service, *We’re your voice at the IRS*, IRS (Accessed May 14, 2023) <https://www.taxpayeradvocate.irs.gov/>.

¹⁸⁵ Complexity, *supra* note 184 at 3.

¹⁸⁶ See Avi-Yonah, *supra* note 157.

Clifford Perez – Writing Sample I

implementation. Finally, it would add a further burden to the IRS as more companies try to define and figure out the contours of the CAMT. Thus, while it is an old solution, it is a significantly flawed solution.

CONCLUSION

Increased dissatisfaction with the amount of taxes corporations are paying is prevalent amongst individuals in the United States,¹⁸⁷ especially aggravated by the perception that some corporations are not carrying their fair share of the tax burden. The CAMT was proposed to hold these companies responsible but from a tax policy standpoint, it is bad tax policy. A CAMT seems like a way to make corporations pay their fair share—at least until they learn its contours—but it does not address the underlying issue that create the discrepancies in the tax code. Instead of simplifying or making the existing tax policy better suited to meeting the goals of the legislature, the CAMT is a short cut to expedite a tax on corporations. Further, it adds to the complexity of the IRC which will inevitably lead to problems down the road as it increases taxpayer burden and can lead to deterioration in the trust held in the IRC. Instead, Congress needs to work to reduce the complexity in the IRC and create tax policy focused on revising any misused tax policy in a way that is beneficial for all taxpayers. “From the standpoint of reducing taxpayer burden, simpler is better.”¹⁸⁸ The CAMT does not make the IRC simpler nor better.

¹⁸⁷ Oliphant, *supra* note 125.

¹⁸⁸ *Id.* at 4.

Applicant Details

First Name	Kendrick
Middle Initial	M
Last Name	Peterson
Citizenship Status	U. S. Citizen
Email Address	kendrick.peterson@berkeley.edu
Address	<div><div>Address</div><div>Street</div><div>474 Clifton st.</div><div>City</div><div>Oakland</div><div>State/Territory</div><div>California</div><div>Zip</div><div>94618</div><div>Country</div><div>United States</div></div>
Contact Phone Number	7026828787

Applicant Education

BA/BS From	University of Notre Dame
Date of BA/BS	May 2020
JD/LLB From	University of California, Berkeley School of Law
	https://www.law.berkeley.edu/careers/
Date of JD/LLB	May 10, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	California Law Review
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
--------------------------------------	----

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Professional Organization

Organizations **Just the Beginning Organization, The
Appellate Project**

Recommenders

Clark, Cameron
cclark@clinical.law.berkeley.edu
Schlosberg, Deborah
dschlosberg@law.berkeley.edu
510-664-4614
Chemerinsky, Erwin
echemerinsky@law.berkeley.edu
5106426483

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

Kendrick Peterson
474 Clifton St.
Oakland, CA 94618
kendrick.peterson@berkeley.edu
(702) 682-8787

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student at the University of California, Berkeley, School of Law. As a former resident of Washington D.C. with family living in Culpeper, Virginia until recently, I have always committed myself to public service in the area. After seeing your dedication to the Share the Wealth program, I noticed your commitment to inclusivity. For these reasons in part, I am writing to apply for a clerkship in your chambers for the 2024-2025 term or the next available term. Due to my desire to clerk specifically in your chambers, I have no preference in term. As a joint-degree student, an Editorial Board Officer for the *California Law Review*, member of the Trial Competition Team, and 2022-2023 Student Body President, I believe my skill set is uniquely positioned for this role.

My interdisciplinary work during law school is overlaid with my own experiences with intersectionality. My journey as a Black, Queer, military student attending a predominantly Catholic institution required me to reimagine how best to articulate my own views. Often being the “only” with my demographic qualities in spaces has taught me a unique style of communication that uplifts clarity, objectivity, and is suited well for collaborative work in chambers.

As a federal law clerk, I would be prepared to make impactful contributions given my strength in legal research and writing fostered by my experiences. These are skills that I have intentionally developed to promote equity through the law. For example, during this past summer, I assisted in drafting an amicus brief in *Students for Fair Admissions v. Harvard*. It was my acute attention to detail, fostered through my Trial team deposition experience, and experience drafting a thesis on meritocratic law school admissions that allowed me to contribute substantively to this impact litigation matter. If chosen to clerk for you, I hope to leverage and develop these same skills.

Please find my resume, transcript, and writing sample attached. My letters of recommendation, from Dean Erwin Chemerinsky (echemerinsky@berkeley.edu), Pro Bono Program Director Deborah Schlosberg (dschlosberg@berkeley.edu), and a joint letter from Director Jeff Selbin, Anavictoria Avila, and Cameron D. Clark on behalf of the Policy Advocacy Clinic are also attached.

Thank you for your consideration and I would welcome any opportunity to interview with you.



Kendrick Peterson

Kendrick Peterson

474 Clifton St. Oakland, CA 94618 • Kendrick.Peterson@berkeley.edu • 702-682-8787

EDUCATION

University of California, Berkeley, School of Law

Juris Doctor Candidate | Joint GPA: 3.815

Berkeley, CA

Expected May 2024

Activities: 2022-2023 Student Body President | *California Law Review:* Alumni Development Editor | Trial Competition Team

Honors/Awards: The Appellate Project (Mentee) | Human Rights Campaign Southern Leader | LGBTQ Point Foundation Scholarship

University of California, Berkeley, Goldman School of Public Policy

Master of Public Policy Candidate

Berkeley, CA

Expected May 2024

Activities: UnCommon Law MPP Consultant | Black Students in Public Policy (BiPP) | Atlanta Violence Defense Trip Leader

Honors/Awards: Javits Fellowship for Political Leadership | Carnegie Mellon Public Policy International Affairs Fellow

University of Notre Dame

Bachelor of Arts, Political Science / Minor: Business Economics and Public Policy.

Notre Dame, IN

May 2020

Activities: Marching Band: Principal Trombonist | TEDX Speaker | Vice Presidential Cabinet for LGBTQ+ Student Climate

Study Abroad: Department of State Gilman Awardee: Ancient Corinth, Greece (Summer 2019)

Honors/Awards: Bill and Melinda Gates Millennium National Scholarship | Harvard John F. Kennedy School of Government Public Policy Leadership Fellow | G. Brinkley Prize for Service in the Department University and Wider World | Theodore Hesburgh Award for Leadership and Public Service (Policy Student of the Year) | U.S Army Reserves Medal for Athletic and Academic Excellence

PROFESSIONAL EXPERIENCE

Morrison Foerster LLP

Summer Associate | Keith Wetmore Fellowship Awardee

Washington, D.C

May 2023 – August 2023

- Attended a firm retreat as one of 6 2L Fellows chosen from an applicant pool of 1200 based on service to the broader legal community, academic rigor, and commitment to diversifying trial advocacy teams.
- Analyzed the definition of “objective fear” in an effort to gain asylum for a client facing both political and religious persecution.

Hogan Lovells US LLP

1L Summer Associate

Washington, D.C

May 2022– August 2022

- Organized memos on insolvency and “bad faith” actions for brief implementation for white collar litigation group.
- Revised research primers on Intersectionality for associates within the Education Regulatory and Appellate cross practice team.
- Drafted amicus brief summaries for Appellate team to implement into argument on behalf of Defendants in the Supreme Court Case *Students for Fair Admissions v. Harvard*.

U.S House of Representatives, Natural Resources Committee

Graduate Legislative Intern

Washington, D.C

June 2021– August 2021

- Compiled research for the investigation team around toxic salmon proliferation and poisonous playground surfaces.
- Conducted legal research on topics related to the Committee’s jurisdictions of Insular affairs and Indigenous peoples’ rights.
- Partnered with congressional staff to develop questions for hearing witnesses from across corporate and administrative law sectors.

McKinsey Social Sector Solutions

Policy/Law Student Consultant

Berkeley, CA

January 2021– May 2021

- Consulted California “ChangeLawyers”, a nonprofit focused on diversifying the legal profession in California as well as beyond.
- Developed an extensive marketing and fundraising plan alongside McKinsey partners to reach aspiring POC legal professionals.
- Constructed a financial sustainability and revenue generation plan with respect to Diversity Equity and Inclusion goals.

African American Policy Forum, Columbia Law School

Administrative Intern Assistant to Professor Kimberlé Crenshaw

New York, NY

June 2020 – August 2020

- Collaborated with Columbia Law School’s Center for Intersectionality and Social Policy Studies on the #SAYHERNAME national campaign under the supervision of a leader in the fields of Intersectionality and Critical Race Theory.
- Facilitated meetings with corporate partners during the aftermath of the 2020 Civil Rights movement and the COVID-19 pandemic.

SKILLS & INTERESTS

Skills: Extemporaneous Slam Poetry and Speech | Tenants Rights: Housing Contract Review | Temporary Protective Order Drafting

Interests: Cross Country Running (1600/800m Club Varsity Runner) | Japanese Animation | Jazz/Concert Trombone

Berkeley Law

University of California

Office of the Registrar

Kendrick Marcellous Peterson
Student ID: 3036333494
Admit Term: 2020 Fall

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Page 1 of 3

Academic Program History
Major: Public Policy (Concurrent with Law JD)
Major: Law JD (Concurrent with Public Policy MPP)

Cumulative Totals 32.0 0.0

2020 Fall					
Course	Description	Units	Law Units	Grade	
PUBPOL 200A	FOUNDATIONS FOR PUB Mia Bird Amy Lerman Ashley Adams	3.0	0.0	A	
PUBPOL 210A	ECO PUB POL ANAL Steven Raphael	4.0	0.0	A-	
PUBPOL 240A	DEC AN MOD Q METH Jesse Rothstein	4.0	0.0	A-	
PUBPOL 271	THE POLITICAL ECONO Robert Reich Asha DuMonthier Nicole Updegrave	4.0	0.0	A	
Term Totals		15.0	0.0		
Cumulative Totals		15.0	0.0		

2021 Fall					
Course	Description	Units	Law Units	Grade	
LAW 200F	Civil Procedure Linda Krieger	5.0	5.0	P	
LAW 201	Torts Talha Syed	4.0	4.0	P	
LAW 202.1A	Legal Research and Writing Linda Tam	3.0	3.0	CR	
LAW 202F	Contracts Asad Rahim	4.0	4.0	P	
Term Totals		16.0	16.0		
Cumulative Totals		48.0	16.0		

2021 Spring					
Course	Description	Units	Law Units	Grade	
MBA 292S	SOCIAL SECTOR SOLUT Nora Silver	3.0	0.0	B+	
PUBPOL 200B	PRO POLICY PRACTICE Mia Bird Meredith Sadin Claire Montialoux	3.0	0.0	A	
PUBPOL 210B	ECO PUB POL ANAL Hillary Hoynes	4.0	0.0	A-	
PUBPOL 240B	DEC AN MOD Q METH Rucker Johnson	4.0	0.0	B+	
PUBPOL 290	SPEC TOPICS PUB POL Jennifer Skeem	3.0	0.0	A	
Term Totals		17.0	0.0		

2022 Spring					
Course	Description	Units	Law Units	Grade	
LAW 202.1B	Written and Oral Advocacy Linda Tam	2.0	2.0	P	
LAW 220.6	Constitutional Law Fulfills Constitutional Law Requirement	4.0	4.0	P	
LAW 230	Criminal Law Erwin Chemerinsky	4.0	4.0	P	
LAW 241	Evidence Andrea Roth	3.0	3.0	P	
LAW 261.7	Disputes with Sovereigns David Oppenheimer David Bowker	1.0	1.0	CR	
Term Totals		14.0	14.0		
Cumulative Totals		62.0	30.0		


 Carol Rachwald, Registrar

Kendrick Marcellous Peterson
Student ID: 3036333494
Admit Term: 2020 Fall

Berkeley Law
University of California
Office of the Registrar

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Cumulative Totals 93.0 47.0




 Carol Rachwald, Registrar

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University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	-	High Honors	CR	-	Credit
H	-	Honors	NP	-	Not Pass
P	-	Pass	I	-	Incomplete
PC	-	Pass Conditional or Substandard Pass (1997-98 to present)	IP	-	In Progress
NC	-	No Credit	NR	-	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: <https://www.law.berkeley.edu/careers/for-employers/grading-policy/>

Transcript questions should be referred to the Registrar.

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June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Kendrick Peterson, University of California, Berkeley, School of Law

Dear Judge Walker:

We write to express our enthusiastic support for Kendrick Peterson to serve as a clerk in your chambers. Kendrick is smart, talented, and compassionate, and we recommend him most highly.

We are clinical instructors in the Policy Advocacy Clinic at the University of California, Berkeley School of Law. The Policy Advocacy Clinic is an interdisciplinary clinic where law and public policy students collaborate to address racial and economic injustice. Current projects include state and national efforts to eliminate regressive and racially discriminatory fees and fines in the juvenile and criminal legal systems.

We have had the pleasure of working with Kendrick since he enrolled in the clinic last fall and returned this spring. During the academic year, students under our supervision conducted research and provided technical legal and policy assistance to local clients pursuing legislative fee repeal campaigns in 15 states, with victories secured from the Pacific Northwest to the Deep South. Kendrick joined our Illinois team, one of four students tasked with building and supporting a campaign during the 2023 state legislative session.

Kendrick's early and engaged contributions leveraged his knowledge at the intersection of law and public policy. As a candidate in Berkeley's joint JD-MPP program, Kendrick was uniquely equipped to handle complex assignments with multi-disciplinary components. As we built our early research agenda, Kendrick played a key role by identifying Illinois' public records laws and developing a plan to collect county-level data on the recipients of juvenile court revenue. After gaining a clear understanding of county-level practices, Kendrick drafted an extensive policy memorandum with regional and county-by-county analyses of the negligible cost of repealing juvenile fees and fines in Illinois. Thanks to Kendrick's comprehensive research, the team had a roadmap to prioritize stakeholder outreach in the areas where our impact would be greatest.

Kendrick also articulated his learning goals and benchmarks, which helped us support his professional development. For example, Kendrick wanted to improve his public speaking and community engagement skills. Pandemic-era challenges notwithstanding, Kendrick eagerly availed himself of opportunities to conduct outreach with grassroots organizations in Illinois, creating new connections and building important partnerships. Along with the team, his efforts culminated in the launch of our campaign kick-off event in Springfield, the state capitol, where Kendrick gave an impassioned speech and call-to-action to a crowd of local activists and advocates. Kendrick distinguished himself as the key speaker who motivated the local community to take action and join our campaign.

By producing consistent and enthusiastic work, Kendrick was well-positioned to draft amendments to our bill to repeal juvenile fees and fines in Illinois. Kendrick carefully considered the original bill language, balancing stakeholder feedback while maintaining the spirit and substance of the bill's intent. Working with his supervisors, Kendrick's diligence resulted in the successful filing of the bill amendment, which has since passed the House of Representatives and the Senate. We remain confident, thanks in considerable part to Kendrick's advocacy and research support, that our bill will reach the Governor's desk by the end of the legislative session.

Kendrick's academic and professional skills make him an exceptional candidate to serve as a clerk. He brings a wealth of professional and personal experience and a critical eye that will support you in reaching the most judicious outcome in your deliberations.

We welcome the opportunity to speak with you more about Kendrick's qualifications or the work we do in the Policy Advocacy Clinic. Thank you for your consideration of Kendrick's application. We could not recommend him more highly.

Sincerely,

/s Jeffrey Selbin

Jeffrey Selbin
Director
Policy Advocacy Clinic
University of California, Berkeley
School of Law

/s Cameron Clark

Cameron Clark - cclark@clinical.law.berkeley.edu

Cameron Clark
Clinical Supervising Attorney
Policy Advocacy Clinic
University of California, Berkeley
School of Law

/s/ Anavictoria Avila

Anavictoria Avila
Clinical Supervising Attorney
Policy Advocacy Clinic
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School of Law

Cameron Clark - cclark@clinical.law.berkeley.edu

May 16, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write enthusiastically to support Kendrick Peterson's application to clerk in your chambers. Kendrick's drive, maturity, organization, and intellectual curiosity will make him an excellent law clerk.

As the Director of the Pro Bono Program at Berkeley Law, I have the great pleasure of working with hundreds of law students each year. The Pro Bono Program at Berkeley Law affords law students the opportunity to engage in meaningful client service under the supervision of licensed attorneys as early as their first semester of law school. Students can engage in direct service work on behalf of low-income clients, conduct research projects in furtherance of the public interest, or perform outreach and education of the community on their legal rights in a variety of substantive areas. Out of the thousands of pro bono students at Berkeley Law that I have worked with, Kendrick is at the very top of the list.

I first met Kendrick in the Fall Semester of his first year as a student at Berkeley Law. I was immediately impressed with his maturity and commitment to pro bono opportunities. As a first-year student, Kendrick joined two pro bono projects, the Tenants' Rights Workshop and the Berkeley Law Alternative Service Trip (BLAST) to Atlanta through which he would provide legal support to survivors of domestic violence. Through these projects, Kendrick learned client interviewing skills, counseled clients facing eviction and domestic abuse, drafted demand letters, prepared temporary restraining orders, and created access to the legal system to individuals who could not afford an attorney. Most importantly, Kendrick did all this work while displaying compassion and care for his clients.

It was clear from my early interactions with Kendrick that he would become one of my pro bono student leaders. Indeed he did. Kendrick is a born leader. This has been evident in the Pro Bono Program through my interactions with him, but also in his leadership of the California Law Review, as well as his service as President of the Student Association at Berkeley Law (SABL). Kendrick's work as a part of BLAST in Atlanta (lovingly dubbed, "BLASTLANTA") was transformative for him and he decided to co-lead the trip in his second year of law school.

As a BLAST co-leader, Kendrick secured the agreement of two legal services organizations, Atlanta Volunteer Lawyers Foundation and Kids in Need of Defense, to partner and supervise our students' legal work. Next, Kendrick and his co-leader recruited students to join him in the work. Kendrick's ability to connect and inspire his peers led to eight students committing their Spring Break to work full-time in Atlanta, Georgia, providing free civil legal services. Kendrick then conducted monthly meetings with his co-leader and eight students from September to March preparing his colleagues and himself so that they could be successful as soon as they landed in Georgia. He carefully selected readings, brought in expert speakers, and conducted trainings that students could immerse themselves in to understand the historical, political, and cultural dimensions of the work they would be doing. This group of ten students then provided free legal services for a full week over Spring Break, expanding the services to deserving clients and developing legal skills all the while.

Our BLAST leaders are given a great deal of responsibility. We entrust them with university resources, ask them to represent the law school in the community, and to serve as a mentor and guide to all the students on their trip. Kendrick stood out as my strongest leader this year. He was also dealt an unlucky blow, his co-leader developed COVID-19 one day into their BLAST trip. All of a sudden, Kendrick was leading the trip on his own. He shined. He communicated with me consistently throughout the trip when he should and managed independently as much as possible. The attorneys were thrilled with the work our students performed and the students came back more committed to public service than before they left. Out of the seven students eligible to do so, four applied to lead the trip next year. This is a testament to Kendrick's efforts.

At the beginning of my own legal career, I had the great pleasure of clerking for the Honorable Jeremy D. Fogel of the United States District Court for the Northern District of California. This experience taught me about the intellectual and personal qualities necessary to excel as a law clerk. Kendrick's work ethic, research and writing skills, self-motivation, and organization will make him an asset to chambers. Equally important, his kindness and good humor will make him a welcome colleague to both you and his co-clerks. I could not recommend Kendrick's application to be a clerk in your chambers more highly.

If I can be of any further assistance in your review of his application, please feel free to contact me.

Sincerely,

Deborah Schlosberg
Director, Pro Bono Program
UC Berkeley, School of Law

Deborah Schlosberg - dschlosberg@law.berkeley.edu - 510-664-4614

May 21, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to highly recommend Mr. Kendrick Peterson for a position as your law clerk. I have gotten to know Mr. Peterson well in the last year. He has been a student in two of my classes: Constitutional Law and Criminal Procedure: Investigations. In the 2022-23 school year, he was co-president of the student body, serving as co-president of Students at Berkeley Law (SABL). I have been very impressed by him and believe that he will have a great career in law.

Mr. Peterson was a frequent participant in class discussions in both classes. His comments were incisive and advanced the discussion. He is very adept at developing arguments to support his position and at disagreeing with other students in a respectful, substantive manner. He spoke openly of his perspective as a gay, Black man and that was important to the discussions both in discussing policing in Criminal Procedure and in considering equal protection in Constitutional Law.

My most extensive contacts with him were in his role of co-president of the law school's student government. We met on a regular basis, as well as when difficult issues arose. Unfortunately, it was a year with a number of sensitive, divisive issues. I was tremendously impressed by Mr. Peterson's responses to them. He was always willing to listen and reconsider his views. He exercised great common sense and good judgment, including sometimes doing what was politically unpopular. He was an effective advocate, developing strong arguments for his position. We sometimes disagreed, but he was never disagreeable and always respectful.

Mr. Peterson brings an upbeat, positive attitude to all he does. He is a true leader and very effective in working with people.

Finally, I want to address his grades. They are not the grades of those who I usually recommend for clerkships. Yet, having worked very closely with him, I have no doubt that he has the intellectual ability to succeed in the most demanding clerkship. He is smart, hardworking, and a pleasure to work with. I am very confident that he would do an excellent job as your law clerk.

Sincerely,

Erwin Chemerinsky

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Federal Highway Administration

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WORKERS PROTECTION PROJECT,

Plaintiff,

v.

FEDERAL HIGHWAY
ADMINISTRATION,

Defendant.

Civil Action No. 21-CV-1836

**DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT**

Professor: Linda Tam

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2. The court should determine the video footage of the bridge collapse as implicating substantial privacy interests and choose not to disclose. 6

3. The Workers Protection Project has not demonstrated a public interest in disclosure beyond the previously released transcript. Therefore, the video should be exempt from disclosure. 9

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I. INTRODUCTION

The Federal Highway Administration (FHWA), through their objective of disseminating insightful perspectives on community infrastructure construction, and historic preservation, has

produced several videos to advance their mission. One of their videos details the implementation of the Competitive Highway Bridge program (CHBP) to restore the Caveman Bridge. Plaintiffs, Workers Protection Project (WPP), are a nonprofit agency that learned of the bridge's collapse via news outlets. Following the collapse, the WPP learned of the deaths of four construction workers and requested video footage of an interview conducted by FHWA representatives prior to the incident. Despite the Plaintiff Freedom of Information Act (FOIA) request being submitted, the video is prohibited from disclosure due to the statutory Exemption 6 which prohibits the release of information if it is determined that the files constitute an unwarranted invasion of privacy. 5 U.S.C. § 552(b)(6). Therefore, FHWA respectfully moves for summary judgment as to prohibit the video from disclosure and protect the surviving family members from being damaged via footage of their loved ones' final moments.

II. STATEMENT OF THE FACTS

The FHWA, a governmental organization committed to the restoration and preservation of the nation's roadways, has contributed over \$225 million in grants to support accessible travel networks. Dexter Decl. Ex. E. In efforts to disseminate the latest news and information on highway related events to the public as well as encourage utilization of resources, the FHWA established their own newsroom. Dexter Decl. ¶ 10.

Through an extensive campaign involving several videos explaining FHWA's methods, the organization established the "FHWA Works" series. Dexter Decl. ¶ 11. This series included pieces illuminating construction methods. Dexter Decl. ¶ 11. Along with videos that assist states in the reduction and elimination of traffic, the FHWA Office of Public Affairs decided to produce a series about the CHBP. Dexter Decl. ¶ 12. The CHBP's primary objective to assist

certain states in their efforts to replace and rehabilitate highway bridges, led to the FHWA's \$900,000 commitment to Oregon to rehabilitate the Caveman Bridge site. Dexter Decl. ¶ 15.

To discuss the great deal of imperative facts around bridge construction that the public may want to know, the FHWA produced an easily digestible video. Dexter Decl. ¶ 16. Outside of this video, to further bolster support for the project, the acting FHWA administrator elected to film a meeting with several construction workers. Dexter Decl. ¶ 18. Throughout this meeting all four workers discussed in extensive detail their personal lives. Dexter Decl. Exhibit E. This included their intimate history in relation to the bridge, family values, family's geographic location, wedding descriptions, and aspirations. Dexter Decl. Ex. E. The video concluded completely omitting any footage of the bridge collapse, and instead finished with a cinematographer committing to film other bridges in the near future. Dexter Decl. Ex. E. Approximately a half hour after the departure of the film crew, the bridge collapsed. Consequently, the collapse killed all four workers previously depicted in the video and left their aforementioned surviving family members without them. Dexter Decl. Ex. 18.

After the bridge collapse and subsequent media attention, the plaintiff learned of the tragedy. Immediately, petitioner sought the video footage of the workers' interview through a Freedom of Information Act (FOIA) request. Dexter Decl. Ex. A. The petitioners stated the disclosure of the video was to be for educational and advocacy purposes as well as to personify the victims. Dexter Decl. Ex. A. This request was then subsequently denied by the FHWA on August 2nd, 2021, due to the violation of the Exemption 6 provision of the statute. Dexter Decl. Ex. B

The plaintiff appealed this decision stating that the privacy interests of the construction workers lapsed with their deaths and was once again denied by FHWA. Dexter Decl. Ex. C.